Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

AMERISOURCE CORPORATION, *et al.*,

Petitioners,

v.

HJB, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), this Court held that an antitrust defendant is entitled to summary judgment when the evidence in the record is "as consistent with permissible competition as with illegal conspiracy." The question presented here is whether this rule applies when the alleged antitrust conspiracy serves the defendants' individual and independent economic interests.

PARTIES TO THE PROCEEDING

Petitioners are AmeriSource Corporation; Bergen Brunswig Corporation; Bindley Western Industries, Inc.; Cardinal Health, Inc.; FoxMeyer Drug Co.; McKesson Corporation; and Whitmire Distribution Corp.

Respondents are HJB, Inc.; Endlers Pharmacy, Inc.; Barry's Cut Rate Stores, Inc.; Central Drug Distributors, Inc.; Brady's Pharmacy, Inc.; Brady Enterprises Inc.; Conney's Pharmacy, Inc.; Solomon Cooper Drugs, Inc.; Meyer's Pharmacy, Inc.; Pat-Y-Ken Drug, Inc.; Starko, Inc.; El-J, Inc.; Blackburn's Physicians Pharmacy, Inc.; Mark Drug; Strathmore, Inc.; Lakeside Schwetteman Pharmacy; Bethayers Pharmacy, Inc.; Independent Pharmacy Cooperative Inc.; Village Pharmacy in Shire's Shopping Center, Inc.; Lurie Pharmacy, Inc.; Melrose Pharmacy, Inc.; Mandel Enterprises, Inc.; LaPorte Products Co.; Guardian Health Care, Inc.; J&M Pharmacy, Inc.; Thrifty Cut-Rate Drug of Seaford, Inc.; Joseph Chang; McHugh Pharmacy Wynnwood, Inc.; Jean Ann Sinverness; Medirex, Inc.; Bacon Normandi Corp.; and James' Pharmacy.

Pursuant to this Court's Rule 29.6, petitioner AmeriSource Corporation states that its parent corporation is AmeriSource Health Corporation and that it has no nonwholly owned subsidiaries. Petitioner Bindley Western Industries, Inc. states that it has no parent corporation and one nonwholly owned subsidiary, Priority Healthcare Services Corporation. Petitioner FoxMeyer Drug Co. states that its parent corporation is Avatex Corp. and that it has no nonwholly owned subsidiaries. Petitioner Whitmire Distribution Corp. states that its parent corporation is Cardinal Health, Inc. and that it has no

PARTIES TO THE PROCEEDING – Continued

nonwholly owned subsidiaries. The remaining petitioners – Bergen Brunswig Corporation, Cardinal Health, Inc. and McKesson Corporation – state that they have no parent corporations or nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

AmeriSource Corporation and the other wholesalers of pharmaceutical products that join in this Petition respectfully pray that a writ of certiorari issue to review the judgment and opinion that the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 15, 1997.

OPINIONS BELOW

The Seventh Circuit's opinion is reported, see *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (1997), and is reprinted in the appendix, (App., *infra*, 1a-35a).

Petitioners filed in the court of appeals a timely petition for rehearing containing a suggestion for rehearing *en banc*. On October 8, 1997, the Seventh Circuit entered an order denying the petition for rehearing. The order is not reported but is reprinted in the appendix. (App., *infra*, 107a).

The opinion of the United States District Court for the Northern District of Illinois granting petitioners' motion for summary judgment and dismissing them from this action is not reported but is reprinted in the appendix. (App., *infra*, 36a-106a).

JURISDICTION

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit in this matter pursuant to 28 U.S.C. § 1254(1). The Seventh Circuit entered its judgment on August 15, 1997. App., *infra*, 1a. Thereafter, petitioners filed a timely petition for rehearing containing a suggestion for rehearing *en banc*. On October 8, 1997, the Seventh Circuit entered an order denying the petition for rehearing. *Id.* at 107a.

STATUTORY PROVISION INVOLVED

Section one of the Sherman Act provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

15 U.S.C. § 1.

STATEMENT

This case involves what the court of appeals described as "a huge price-fixing litigation" (App., *infra*, 1a); as the district court explained, the plaintiffs are "[t]ens of thousands of retail pharmacies" and the defendants are "[v]irtually all of the leading manufacturers and wholesalers of brand name prescription drugs." *Id.* at 36a-37a. The district court granted summary judgment to the wholesaler defendants, the petitioners here, applying a standard that "limits the extent to which permissible inferences from ambiguous evidence may be drawn in a Section 1 Sherman Act case." *Id.* at 43a. The court of appeals reversed. Although that court did not set aside any of the district judge's factual findings, it applied a different legal standard to the evidence: the Seventh Circuit was of the view that summary judgment was inappropriate because the wholesalers' "innocent interpretation[s]" of the evidence were "not inevitable." *Id.* at 29a-30a.

This holding is insupportable. It exacerbates a sharp conflict among the circuits on the rules governing summary judgment in antitrust cases. It cannot be reconciled with this Court's decisions in *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984). And it will

make it very difficult for courts to dispose even of patently insubstantial antitrust claims on summary judgment, a result that will encourage abusive litigation and penalize legitimate business conduct. Further review of the decision below therefore is imperative.

1. Pharmaceuticals typically pass through three levels of distribution before they reach the ultimate consumer. Pharmaceutical manufacturers generally sell their products to wholesalers, who then distribute the drugs to retail pharmacies, hospitals, health maintenance organizations ("HMOs"), and other health care providers. Through the mid-1970s, most hospitals purchased pharmaceuticals directly from manufacturers. Beginning in that decade, however, wholesalers vastly increased the efficiency of their business through electronic ordering, computerization, warehouse automation, and related improvements. See Fein, *The Triggers of Consolidation in Drug Wholesaling*, HEALTHCARE DISTRIBUTOR, Nov. 1997, 52, 60. These changes allowed wholesalers' operating expenses to fall dramatically, from 11% of revenue in 1975 to 6.2% in 1985 and 2.3% in 1992. At the same time, wholesaler profit margins remained low and stable, ranging from 2.0% in 1975 to 2.6% in 1980, 2.4% in 1985 and 1990, and 2.3% in 1992. App., *infra*, 91a. It thus is undisputed that "wholesalers have passed along to their customers the fruits of their efforts to wring increased efficiencies out of the drug distribution industry." *Id.* at 91a-92a. These developments increased the wholesalers' value to hospitals and retail pharmacies alike.[1]

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[1] So far as retail pharmacies are concerned, wholesalers provide economies of scale and vastly reduce the number of transactions required each year. Wholesalers also store products in close proximity to pharmacies and pharmacy customers, which permits "just-in-time" delivery and helps pharmacies increase their drug turnover rate. Hospitals receive similar benefits from use of the wholesalers' distribution system; the

At the same time, the price and distribution of pharmaceuticals has been affected by another development: hospitals' and managed care organizations' (including HMOs') use of formularies, which are restrictive lists that identify and limit the drugs that their physicians are allowed to prescribe. See App., *infra*, 41a. The use of formularies gives these institutional purchasers the ability to shift market share substantially among competing drugs with the stroke of a pen; because hospital buying groups, hospital chains, and managed care organizations choose the formularies for many high-volume purchasers, their bargaining power is substantial. This combination of factors has allowed such institutional purchasers to demand and obtain discounts from pharmaceutical manufacturers.

In contrast, retail pharmacies do not have mandatory formularies and must carry the range of brands that their customers (or their customers' physicians) demand. As a consequence, pharmacies have not been able to command discounts similar to those obtained by institutional purchasers of drugs. As the district court explained, quoting a study conducted by the Minnesota Department of Health:

> [a]ll types of pharmacies can move volume, but retail groups have little or no power to offer market share to manufacturers because they must stock drugs for several different third-party payers, all with different formularies. Hospital buying groups and managed care formularies can provide market share to manufacturers and shift all non-formulary drugs to those in the formulary. Formularies are what distinguish

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increased efficiency of wholesalers allowed hospitals to dramatically reduce their pharmaceutical inventory levels. See Fein, *supra*, at 62. As a result, while wholesalers accounted for less than half of all pharmaceutical sales in the mid-1970's, that proportion now approaches 85%. *Ibid.*

> third-party payer and hospital pharmacy bargaining positions from retail pharmacy buying group[s].

Id. at 88a-89a.

Over time, a procedure developed – the so-called "chargeback" system – that permitted manufacturers to give discounts to institutional buyers while also enabling such buyers to obtain the benefits and efficiencies of the wholesalers' distribution system. As the court of appeals described it,

> [u]nder that system, the manufacturer makes a contract with the favored customer establishing a discounted price at which the customer is entitled to buy from wholesalers; the wholesaler sells to the favored customer at that price; and the manufacturer then reimburses the wholesaler for the difference between the regular wholesale price and the discounted price. So if the manufacturer's regular price to the wholesaler for some drug is $100 and the contractually agreed upon discounted price for a favored customer is $75, the wholesaler will pay the manufacturer $100 for the drug but will resell it to the favored customer at $75 and bill the manufacturer $25.

App., *infra*, 2a.

It is undisputed that the wholesalers could not remain economically viable while cutting prices to customers who had not been given discounts by a manufacturer. See *id.* at 109a (Br. of Plaintiffs-Appellees in No. 96-2814 (7th Cir.), at 12 ("The wholesalers have no influence in the determination of these prices other than with respect to the modest fee they impose for their services.")). As for why the wholesalers participated in the manufacturers' chargeback system, the district court found

> [t]he reasons * * * are both documented and obvious. * * * They include: [1] failure on the part of the wholesaler to participate in chargebacks presents

> the substantial risk of losing a significant amount of business, including all business represented by sales to contract buyers that are not handled through chargebacks; [2] participation in the chargeback system offers a wholesaler the opportunity to increase its business; [3] failure to participate in the chargebacks may result in the manufacturer dealing directly with the contract customer for all purposes (and not merely the negotiation of the discount); and [4] loss of business to a competing wholesaler not adverse to the chargeback system.

Id. at 84a. Indeed, losing the ability to carry the pharmaceuticals of even a single significant manufacturer would mean that the wholesaler could not offer the full range of "just-in-time" inventory and related services necessary to compete with other wholesalers that serve both retail and institutional customers.

2. This action, brought under Section 1 of the Sherman Act, involves hundreds of consolidated cases (including a nationwide class action and hundreds of suits brought by plaintiffs who opted out of the class) filed by pharmaceutical retailers against manufacturers and wholesalers of brand name prescription drugs.[2] Focusing on the manufacturers' refusal to offer discounts to retail pharmacies – and on the chargeback system through which manufacturers made discounts available to institutional buyers – plaintiffs asserted that the manufacturers and wholesalers "collusively created and maintained a dual pricing system that raises or stabilizes prices paid for brand name prescription drugs by retail

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[2] Hundreds of cases were filed across the country and were transferred to the Northern District of Illinois for consolidated or coordinated pretrial proceedings. App., *infra*, 36a n.1. Brand name prescription drugs are " 'drugs that are sold under the brand name of the Manufacturer rather than the drug's generic name.' " *Id.* at 37a n.3 (citation omitted).

pharmacies * * * [,] refus[ing] to make available to community pharmacies various discounts, rebates, and other price-lowering mechanisms that each of the Manufacturer Defendants has made available to 'institutional' or 'managed care' buyers." App., *infra*, 38a (footnote omitted). The manufacturers denied the existence of any agreement to withhold discounts from pharmacies. For their part, the wholesalers contended that, whatever the manufacturers may or may not have agreed among themselves, the wholesalers were not part of any conspiracy but merely complied with the manufacturers' various chargeback policies.

In 1994, the district court, opting to permit full discovery, denied an early motion for summary judgment that the wholesalers filed. *In re Brand Name Prescription Drugs Antitrust Litig.*, 867 F. Supp. 1338, 1342-43 (N.D. Ill. 1994).[3] Two years later, after discovery that included the taking of a thousand depositions and the production of 50 million pages of documents (App., *infra*, 29a), the district court granted the wholesalers summary judgment. *Id.* at 79a-94a. The court began by sketching the legal standard described in *Matsushita* and *Monsanto*, explaining that "antitrust law limits the extent to which permissible inferences from ambiguous evidence may be drawn in a Section 1 Sherman Act case." *Id.* at 43a. The court added that "[s]pecifically, 'conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.' " *Id.* at 44a (quoting *Matsushita*, 475 U.S. at 588).

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[3] The plaintiffs were willing to dismiss their claims against the wholesalers "for no money whatsoever" in exchange for an assignment of any claims that the wholesalers might have had against the manufacturers. App., *infra*, 93a. This proposal was refused, and the wholesalers remained in the case, choosing to risk litigation rather than assign what they regarded as meritless claims.

Thus, "the range of permissible inferences is limited when a plaintiff asks a court to infer a price-fixing conspiracy from normal business activity that, standing alone, is consistent with lawful competition." *Ibid.*

> Against this background, the district court found that
>
> [t]here is no evidence, direct or circumstantial, in the entirety of this massive record that the wholesalers had *any* involvement in the decisions not to afford discounts to the plaintiffs. * * * The wholesalers were not consulted about the no-discount policies prior to or during their implementation, and no evidence exists that the wholesalers' position was considered by or carried any weight with the manufacturers. On the precise question of the no-discount conspiracy charge and the conscious commitment to achieve the unlawful objective, the evidence is conspicuously absent as to the wholesalers. In truth, the wholesalers had nothing to do with the no-discount policies.

App., *infra*, 80a.

The court contrasted this absence of evidence supporting the wholesalers' alleged " 'conscious commitment' " to a conspiracy with "the more compelling evidence" that the wholesalers "*decried* the * * * no-discount pricing policies," explaining that retail pharmacies "constituted the most important customers of the wholesalers" and that as the pharmacies' "unhappiness with differential pricing increased, so did the wholesalers[']." *Ibid.* (emphasis added). The court therefore found that "[t]he role the pharmaceutical manufacturers occupied in the healthcare industry, along with their economic power and the importance of their marketing decisions, more compellingly explains the chargeback system rather than theories of wholesaler complicity." App., *infra*, 93a. The court concluded that, "[a]lthough afforded the chance to do so, the plaintiffs have failed to produce evidence which would permit a reasonable jury to conclude that

the wholesalers were members of the conspiracy charged, even assuming that such a conspiracy existed." *Id.* at 94a.

While granting the wholesalers' summary judgment motion, the district court denied summary judgment to the manufacturers, finding that issues of material fact concerning the existence of the alleged manufacturers' conspiracy justified sending the case to the jury. App., *infra*, 70a-78a. The court noted, however, that the chargeback system was not itself illegal, and that plaintiffs conceded the point. *Id.* at 84a. The court went on to hold that the retailers' claims against the manufacturers were not barred by the doctrine of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), which ordinarily forecloses antitrust claims by indirect purchasers. App., *infra*, 95a-106a.

3. The court of appeals reversed the grant of summary judgment to the wholesalers. App., *infra*, 29a-33a. In doing so, the court relied on what it characterized as "a number of instances in which officers of the defendant wholesalers urge[d] manufacturers to hold the line against discounting to pharmacies and their buying groups, and pledge[d] to adhere to the chargeback system." *Id.* at 29a. Noting the wholesalers' argument that this evidence was "susceptible of an innocent interpretation," the court opined that "we must construe the evidence as favorably to the plaintiffs as the record permits" and that the defendants' interpretations must be rejected (and summary judgment denied) if those interpretations "are not *inevitable*." *Id.* at 29a-30a (emphasis added). In reaching this conclusion, the court of appeals found *Matsushita* inapposite because the plaintiffs' theory of conspiracy was economically "plausible." *Id.* at 30a-31a. The court also noted the substantial body of evidence supporting the wholesalers' position, including their "wafer-thin profit margins" and the instances in which they "sought permission to give discounts to pharmacies, and even helped to organize buying groups of pharmacies";

the court held this material irrelevant to the summary judgment question, however, stating that "[i]t is just evidence to be weighed in the balance by the trier of fact." *Id.* at 32a.

The court of appeals also reversed the district court's ruling on *Illinois Brick*, holding that the retailers' claims against the manufacturers "is just the kind of complaint that *Illinois Brick* bars" because the retailers purchased drugs directly from the wholesalers rather than the manufacturers. App., *infra*, 10a. As a consequence, the court recognized that, were it not for the wholesalers' status as defendants, the retailers' federal claims against the manufacturers would have to be dismissed. *Id.* at 12a.[4] But the court found that keeping the wholesalers in the case as defendants means that pharmacies are "direct purchasers from the conspirators," which makes the *Illinois Brick* defense "go by the board." *Id.* at 7a.[5]

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision gives the wrong answer to a recurring question of great importance that

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[4] A relatively small number of plaintiffs allege that they purchased drugs directly from the manufacturers; those claims would survive dismissal of the wholesalers from the litigation.

[5] In addition, the court of appeals reversed the district court's refusal to remand to state court a class action that alleged violations of Alabama's antitrust statute (App., *infra*, 12a-29a) and reversed the district court's grant of summary judgment in favor of one of the manufacturers, DuPont Merck Pharmaceutical Co. (*id.* at 33a-35a). Those aspects of the Seventh Circuit's holding are not at issue here. Separate petitions for certiorari filed by manufacturers challenge the state-court remand (No. 97-775) and argue that the Seventh Circuit erred in holding that *Illinois Brick* does not bar retailers from suing the manufacturers so long as the wholesalers are deemed to be co-conspirators (No. 97-xxxx).

has confused and deeply divided the courts of appeals. In *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court held that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," so that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy" (*id.* at 588) – and that is so even if the plaintiffs' allegations are otherwise "plausible." *Id.* at 597 n.21. As the Eighth Circuit recently explained, however, the circuits sharply disagree about the meaning of *Matsushita*. See *Corner Pocket of Sioux Falls, Inc.* v. *Video Lottery Techs., Inc.*, 123 F.3d 1107, 1109 (1997). The majority of the courts of appeals interprets the *Matsushita* standard in accordance with its terms and grants summary judgment to defendants if the evidence is "consistent with permissible competition," even if the alleged conspiracy is economically plausible. In contrast, a minority of the circuits, joined by the Seventh Circuit in this case, has held the rule of *Matsushita* inapplicable when the alleged conspirators had a plausible reason to conspire.

The Seventh Circuit's error has serious consequences. Thinly supported allegations of elaborate antitrust conspiracies are common, and could be disposed of quickly under a proper application of the *Matsushita* standard. Moreover, weeding out such suits prior to trial is of great practical importance because antitrust conspiracy cases typically are enormous consumers of judicial time and resources. Yet the Seventh Circuit's standard makes pretrial resolution of such cases virtually impossible; indeed, the court of appeals denied summary judgment in reliance on the sort of routine and inevitable vertical communications along the distribution chain that this Court and other courts of appeals have explicitly identified as *in*sufficient to withstand a motion for summary judgment.

Review here is important for an additional reason. The issue presented in this case often arises in suits that

have serious economic ramifications for national industries, as was true in *Matsushita* and *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). This litigation is a striking example: the plaintiffs name as defendants the Nation's leading drug wholesalers, and direct their allegations at long-standing business practices that are central to the operation of the United States' pharmaceutical industry. This case therefore is not only legally important, but economically momentous as well. Consideration by this Court of the issue presented here accordingly is warranted.

A. The Circuits Are Split On The Proper Application of *Matsushita*

1. The court below found it unnecessary to examine whether the wholesalers' actions were as consistent with competitive conduct as with conspiracy. Instead, because the Seventh Circuit believed that it *might* have made economic sense for the wholesalers to conspire with the manufacturers, the court strained to "construe the evidence as favorably to the plaintiffs as the record permits" and held that summary judgment had to be denied because innocent interpretations of that evidence were not "inevitable." App., *infra*, 30a. The court thus refused to acknowledge the "limit[ed] * * * range of permissible inferences from ambiguous evidence in a § 1 case" (*Matsushita*, 475 U.S. at 588) and necessarily held inapplicable the rule that "conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." *Id.* at 597 n.21. This holding offers a free pass for weakly supported antitrust conspiracy cases so long as the alleged conspiracy makes economic sense. That precise conclusion, however, has been rejected by six circuits – the Second, Fourth, Fifth, Eighth, Tenth, and Eleventh – which take this Court's statements in *Matsushita* and

Monsanto at face value, granting summary judgment where the inference of non-collusive activity arising from the record evidence is in equipoise with (or is stronger than) any inference of illegal conspiracy.

The Eighth Circuit recently explained this conflict among the circuits in terms that anticipated the decision below. That court observed that cases from the Third and Ninth Circuits, like the Seventh Circuit's decision in this case, have held that *Matsushita* simply "does not apply" where the alleged conspiracy "serve[s] defendants' economic interests." *Corner Pocket of Sioux Falls*, 123 F.3d at 1109. As we explain below, the Sixth Circuit has adopted a similar view. The Eighth Circuit, in contrast, sided with "the majority of courts and commentators who read *Matsushita* more broadly." *Ibid.* (citing 2 P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 322, at 70-72, 75-81 (rev. ed. 1995)). This acknowledged conflict on a matter of great moment merits this Court's attention.

2. The Third Circuit lines up squarely with the court below on the question presented in this petition, having stated repeatedly that it will not apply the evidentiary standard set forth in *Monsanto* and *Matsushita* so long as the alleged conspiracy makes economic sense. For example, in *Petruzzi's IGA Supermarkets, Inc.* v. *Darling-Delaware Co.*, 998 F.2d 1224, 1232 (3d Cir.), cert. denied, 510 U.S. 994 (1993), the Third Circuit made clear that advancing a "theory of conspiracy [that] is not implausible" excuses a plaintiff from the strictures set forth in *Matsushita* and *Monsanto*. See *id.* at 1321 (*Matsushita* "simply stressed that to survive summary judgment in the absence of direct evidence or strong circumstantial evidence of an agreement, a plaintiff must assert a theory that is plausible"). The court subsequently expanded upon this holding, declaring that "the meaning * * * ascribe[d] to circumstantial evidence will vary depending upon the challenged conduct," so that the limitations of "*Monsanto* and *Matsushita* do not apply" at all "when [the] challenged action

is overtly anticompetitive." *Alvord-Polk, Inc.* v. *F. Schumacher & Co.*, 37 F.3d 996, 1001 (3d Cir. 1994), cert. denied, 514 U.S. 1063 (1995). Not surprisingly, this view prompted vigorous dissent within the Third Circuit. See *id.* at 1019-1021 (Stapleton, J., dissenting) (supporting affirmance of summary judgment against "vertical conspiracy" because "no evidence in the record * * * tends to exclude the possibility that [the manufacturer] acted unilaterally"); *Big Apple BMW, Inc.* v. *BMW of North America, Inc.*, 974 F.2d 1358, 1389 (3d Cir. 1992) (Roth, J., dissenting) ("a rigorous application of the test set forth in *Monsanto* requires that we affirm the grant of summary judgment"), cert. denied, 507 U.S. 912 (1993); P. AREEDA & H. HOVENKAMP, *supra*, ¶ 322, at 76 ("The dissenting judge [in *BMW*] correctly insisted that summary judgment cannot be avoided simply by showing that the evidence is consistent with an agreement.").

As the Eighth Circuit observed, the Ninth Circuit also has held summary judgment unavailable if the alleged conspiracy is not economically irrational and the "inferences of conspiracy and inferences of innocent conduct are equally plausible." *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 906 F.2d 432, 438 (9th Cir. 1990), cert. denied, 500 U.S. 959 (1991). The Ninth Circuit thus held that *Matsushita* and *Monsanto* cannot "be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct." *Id.* at 439.[6] Instead, the court concluded that the *Matsushita* rule applies only when "permit[ting] an inference of antitrust conspiracy from circumstantial evidence * * * would have the effect of deterring significant procompetitive conduct." *Ibid.* As

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[6] The Third Circuit relied upon this language in *Petruzzi's*, 998 F.2d at 1231.

Professors Areeda and Hovenkamp have noted, this aspect of *Petroleum Products* worked a "significant expansion of the conspiracy concept." P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 1436'd, at 613 (1997 Supp.). See also Spiegel & Liao, *Avoiding Summary Judgment After* Matsushita *and* Monsanto, ANTITRUST, Spring 1991, at 12 (refusal in *Petroleum Products* to grant summary judgment on "ambiguous evidence that is as consistent with conspiracy as with competition" represented a clear break with other courts).[7]

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[7] The Ninth Circuit, however, has not spoken with one voice on this issue; the *Petroleum Products* decision sharply diverged from earlier post-*Matsushita* rulings of different panels of that court. For example, in an opinion joined by then-Judge Kennedy, the Ninth Circuit found no triable issue of fact because the "ambiguous evidence provided" by the plaintiffs did not "tend[ ] to exclude the possibility of independent action by the manufacturer and distributor[s]." *O.S.C. Corp.* v. *Apple Computer, Inc.*, 792 F.2d 1464, 1467, 1469 (9th Cir. 1986). Another pre-*Petroleum Products* decision of the same court, this one authored by then-Judge Kennedy, rejected the view that the existence of "competing inferences" compelled denial of summary judgment; to the contrary, the court held that "conduct that is as consistent with permissible competitive behavior as with illegal conspiracy does not, without more, support an inference of a conspiracy" where the choice between such "competing inferences" to support a verdict "necessarily would be speculative." *Richards* v. *Neilsen Freight Lines*, 810 F.2d 898, 904 (9th Cir. 1987) (concession that challenged conduct resulted from "gentleman's agreement" was too ambiguous to defeat summary judgment). The Ninth Circuit's most recent decisions, however, have cited *Petroleum Products* as stating the controlling summary judgment standard. See *Pacific Gas & Electric Co.* v. *Howard P. Foley Co.*, 1996-1 Trade Cas. ¶ 71,340 (1996), cert. denied, 117 S. Ct. 685 (1997); *E.W. French & Sons, Inc.* v. *General Portland, Inc.*, 1995-2 Trade Cas. ¶ 71,112 (1995); *Sandmann* v. *FSLIC*, 1991 WL 162322 (1991).

The Sixth Circuit likewise has declined to acknowledge that there was more to *Matsushita* than a holding that claims grounded on implausible economic theories should be withheld from the jury. *Ezzo's Investments, Inc.*, v. *Royal Beauty Supply, Inc.*, 94 F.3d 1032, 1036 (6th Cir. 1996). Once it found that the alleged conspiracy in *Ezzo's* was not "implausible," the Sixth Circuit reversed a grant of summary judgment because the evidence "d[id] not preclude an inference that [defendants] agreed that [the plaintiff's] prices were too low and that something should be done about it." *Ibid.* In so ruling, the Sixth Circuit articulated and applied a governing summary judgment standard that departed from *Matsushita*. See P. AREEDA & H. HOVENKAMP, *supra*, ¶ 322', at 403 (1997 Supp.) ("this standard [employed in *Ezzo's*] seems to be weaker than the [one] *Matsushita* * * * articulated.").

3. On the other hand, the Eighth Circuit was correct in noting that "the majority of courts * * * read *Matsushita* more broadly." *Corner Pocket*, 123 F.3d at 1109. In addition to that court of appeals, the Second, Fourth, Fifth, Tenth, and Eleventh Circuits have applied *Monsanto* and *Matsushita* to require rather than to preclude summary judgment against antitrust conspiracy claims that, like the alleged wholesaler-manufacturer conspiracy in this case, rested on evidence that is as consistent with independent action as with conspiracy. Indeed, many of those courts' decisions involved evidence closely equivalent to the "tasty morsels" (App., *infra*, 29a) upon which the Seventh Circuit relied here.

In *Corner Pocket*, the Eighth Circuit itself affirmed a grant of summary judgment because the plaintiffs' strongest evidence, viewed in light of "objectively observable market conditions" and the "legitimate business reasons" advanced for some of the allegedly conspiratorial conduct, did not "tend[ ] to exclude the possibility that the alleged conspirators acted independently." 123 F.3d at

1112. Particular bits of evidence relied upon by the plaintiff did not suffice to defeat summary judgment because they were "ambiguous." *Id.* at 1112, 1114. In an earlier case, the same court reversed a jury verdict on the ground that the "evidence [wa]s as consistent with permissible unilateral conduct [by a manufacturer] as it is with illegal conspiracy, and * * * *Monsanto* does not permit a jury to infer the existence of a conspiracy from ambiguous evidence." *Lovett* v. *General Motors Corp.*, 998 F.2d 575, 579 (8th Cir. 1993), cert. denied, 510 U.S. 1113 (1994). That was so even though the manufacturer had cut off the plaintiff's supply after competing dealers had repeatedly importuned the manufacturer to "take strong action to eliminate" the price-cutting plaintiff's distribution program. *Id.* at 577. The Eighth Circuit found it dispositive that "the range of permissible inferences from ambiguous evidence is limited in a section one case" (*id.* at 578) and held the plaintiff's evidence fatally "ambiguous" because "the evidence is as consistent with [the manufacturer's] taking independent action to preserve its distribution system as with conspiracy." *Id.* at 580.

The Second Circuit similarly has applied *Monsanto* and *Matsushita* to limit the inferences permitted from ambiguous evidence of conspiracy without requiring that the alleged conspiracy *also* make no economic sense. That court recognized that a finding of antitrust conspiracy is insupportable where "the evidence point[ed] with at least as much force toward unilateral action [by the defendants] as toward conspiracy, and a jury would have to engage in impermissible speculation to reach the latter conclusion." *H.L. Hayden Co.* v. *Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1014 (2d Cir. 1989) (internal quotation marks omitted) (bracketed material added by the court). Applying "the special requirements of the *Monsanto-Matsushita* rule for section one conspiracies," the court therefore dismissed claims alleging a manufacturer-distributor agreement on the basis of conduct that was "ambiguous"

and was as "consistent with permissible activity" as with conspiracy. *Id.* at 1014, 1016.

The Fourth Circuit likewise rejected an allegation of a manufacturer-dealer conspiracy when "ambiguous" evidence did not meet the "requirement that there be clear evidence of conspiracy." *Parkway Gallery Furniture, Inc.* v. *Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801, 804 (4th Cir. 1989). The court explained that "[a]ny evidentiary fact may support a wide range of inferences," but found it crucial that "the discrete inferences necessary under *Monsanto* to support a conspiracy theory simply do not flow" from testimony that many dealers were in agreement with the manufacturer's distribution policies and from evidence that the manufacturer "sought assurances from its dealers that they would comply with its new marketing policy." *Id.* at 806. The Fourth Circuit therefore took issue with holdings of other courts of appeals that, in its view, "in effect misconstrued 'tends to exclude the possibility' of independent conduct, *Matsushita*, 475 U.S. at 588, to mean something like 'arguably consistent with the possibility of a conspiracy.' " *Id.* at 806 n.4.[8]

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[8] In the same vein, the Fifth Circuit affirmed summary judgment in another case involving an alleged vertical conspiracy because the evidence did not "tend to exclude the possibility that the defendants acted independently." *Culberson, Inc.* v. *Interstate Electric Co.*, 821 F.2d 1092, 1093 (5th Cir. 1987). See also *Matrix Essentials, Inc.* v. *Emporium Drug Mart, Inc.*, 988 F.2d 587, 593-594 (5th Cir. 1993) (following *Culberson*). The Tenth and Eleventh Circuits have applied the same rule to alleged horizontal and vertical conspiracies that made perfect economic sense. See *Multistate Legal Studies, Inc.* v. *Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 63 F.3d 1540, 1556-1557 (10th Cir. 1995) (summary judgment appropriate where conduct was as consistent with "normal posturing that occurs in any contract renegotiations" as with "threatening to violate an existing secret agreement not to compete"), cert.

4. The decision of the Seventh Circuit deepens the existing conflict among the circuits. And that conflict is ripe for resolution by this Court. The issue has been litigated across the courts of appeals, with at least ten circuits weighing in. Given the disagreement in the lower courts, commentators repeatedly have observed that "the standard necessary to defeat summary judgment [in antitrust cases] is, at best, unclear." McQueen, *The Summary Judgment Standard in Antitrust Conspiracy Cases and* In re Travel Agency Commission Antitrust Litigation, 62 J. AIR L. & COMM. 1155, 1157 (1997). See also, *e.g.*, DeSanti & Kovacic, Matsushita: *Its Construction and Application by the Lower Courts*, 59 ANTITRUST L.J. 609, 618 (1991). This disagreement, moreover, is of profound practical importance, determining the outcome of litigation: there is little doubt that the plaintiffs' claims in this case would have been dismissed had the action been litigated in the Second, Fourth, Fifth, Eighth, Tenth, or Eleventh Circuits. In these circumstances, this Court should grant the petition to resolve the conflict in the court of appeals.

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denied, 116 S. Ct. 702 (1996); *Dreiling* v. *Peugeot Motors of America, Inc.*, 850 F.2d 1373, 1380 (10th Cir. 1988) (evidence was insufficient because "at best, ambiguous" and "perfectly consistent[ ] with the defendants' permissible interests"); *Gibson* v. *Greater Park City Co.*, 818 F.2d 722, 724-725 (10th Cir. 1987) (same where defendants "offered plausible, nonconspiratorial explanations for each of the actions about which [the plaintiff] complains" and "[a]ll of the evidence presented by the plaintiffs is ambiguous: it can support either a permissible or a conspiratorial motive"); *Dunnivant* v. *Bi-State Auto Parts*, 851 F.2d 1575, 1580 (11th Cir. 1988) (upholding judgment against claim of retailer-supplier conspiracy because "conduct as consistent with illegal conspiracy as with permissible competition does not support an inference of antitrust conspiracy").

B. The Decision Below Is In Conflict With This Court's Decisions

1. Given the inconsistency of the Seventh Circuit's decision with the weight of authority among the courts of appeals, it should come as no surprise that the decision below also cannot be reconciled with this Court's holdings. In *Monsanto*, the Court concluded that an inference of conspiracy cannot be drawn "from highly ambiguous evidence," adding that "[t]here must be evidence that tends to exclude the possibility that the [defendants] were acting independently" (465 U.S. at 763, 764); "[t]he correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor." *Id.* at 768. *Matsushita* applied that understanding in the summary judgment context, holding that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." 475 U.S. at 588. For this reason, the Court explained,

> *conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.* * * * To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. [*Monsanto,*] 465 U.S., at 764. [Plaintiffs], in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action * * * .

Ibid. (emphasis added). See *id.* at 597 n.21.

The Seventh Circuit, however, did not implement this principle. Instead, that court simply brushed aside the "innocent interpretation[s]" offered by the defendants because it believed that it had to "construe the evidence as favorably to the plaintiffs as the record permits," meaning that summary judgment had to be denied if the

defendants' "interpretations * * * [were] not inevitable." App., *infra*, 29a-30a (emphasis added). The court of appeals thus effectively altered the standard for summary judgment in antitrust conspiracy cases from a requirement that *plaintiffs* present "evidence that tends to exclude the possibility that the alleged conspirators acted independently" (*Matsushita*, 475 U.S. at 588) to a rule that precludes summary judgment for the defense unless the inference of independent action is *inevitable*. The *Matsushita* standard applies, the court added, only when "the plaintiff's theory of [antitrust] violation makes no economic sense." App., *infra*, 30a.

In taking this approach, the court of appeals confused the *summary judgment standard* set forth in *Matsushita* with the Court's *discussion of the evidence in that case*. In applying its legal standard, the Court in *Matsushita* noted that the conspiracy there alleged was in fact implausible as a matter of economics. See 475 U.S. at 588-593. And it doubtless is tempting for appellate courts – presented, as in this case, with an "indigestible mass" of documents and depositions (App., *infra*, 29a) – to focus on the plaintiffs' economic theories to the exclusion of the evidence; Chief Judge Posner's opinion for the Seventh Circuit thus devoted far more attention to a theoretical analysis of the plausibility of the plaintiffs' economic construct than to the nitty-gritty of the record. See App., *infra*, 29a-33a.[9] That led to a lengthy flight of fancy in

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[9] Indeed, the court of appeals confined its discussion of the facts to the breezy declaration that it would not "extend [its] opinion with quotations" to the record, declining even to identify which of the "tasty morsels" offered by the plaintiffs it found to be probative. App., *infra*, 29a. The court's theoretical bypass of the record was plainly inconsistent with its role. An appellate court considering a summary judgment issue must engage the record, particularly when the court is overturning the conclusions of a district judge who devoted careful and

which the Seventh Circuit repeated plaintiffs' speculation that "the wholesalers were the manufacturers' cats-paws," being members of an "endangered commercial species" who agreed to be " 'hire[d]' * * * to help police the [manufacturers'] cartel" so as to prolong their own precarious existence. *Id.* at 30a-31a.[10]

That focus on theory, however, plainly misconstrued the import of *Matsushita* and Federal Rule of Civil Procedure 56. Although this Court has held that a defendant does not automatically merit summary judgment upon the presentation of "*any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market" (*Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451, 468 (1992)), the Court also has not allowed plaintiffs to avoid judgment so long as they present a plausible theory to go along with ambiguous evidence of conspiracy. See *Brooke Group*, 509 U.S. at 230-243. To the contrary, the Court in *Matsushita* rejected *precisely* that proposition, specifically warning that "*[w]e do not imply that, if [the defendants] had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy.* * * * [C]onduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." 475 U.S. at 597 n.21 (emphasis added).

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thorough attention to the evidence. In addition, as we explain below, the *types* of evidence on which the court relied plainly are insufficient to forestall summary judgment under *Monsanto* and *Matsushita*.

[10] Between 1980 and 1992, the members of this "endangered commercial species" increased their annual sales by more than 500% – from $6.5 billion to $42 billion. *The Importance of Being a Distributor*, Med Ad News, March 1, 1994, at 24. Their market share in the distribution of pharmaceuticals increased by about 70% during that period. See n.1, *supra*.

The reason for this rule is clear: a standard that allows an inference of conspiracy to be drawn from ambiguous evidence will "inhibit management's exercise of its independent business judgment" and discourage legitimate, procompetitive conduct. *Monsanto*, 465 U.S. at 764. Professors Areeda and Hovenkamp accordingly have read *Matsushita* to establish that "summary judgment should be granted for the defendant unless the evidence as a whole would allow a reasonable fact-finder to conclude not just that the evidence is consistent with a conspiracy but that the alleged conspiracy is more probable than not"; "when the evidence is in equipoise * * * , summary judgment will be granted [to the defendant]." 2 P. AREEDA & H. HOVENKAMP, *supra*, ¶ 322, at 70. See *id.* at 71-72. As a consequence, "there is a minimum evidentiary standard even in cases where the alleged conspiracy is a rational one: if the proffered evidence is equally consistent with competition and collusion, then no fact issue of collusion is established." *Id.* ¶ 322', at 405 (1997 Supp.) (citing *Matsushita*, 475 U.S. at 596-597 & n.21). That is why Professors Areeda and Hovenkamp have characterized the Ninth Circuit's decision in *Petroleum Products* – whose tack was taken by the court below in this case – as "[q]uite wrong." *Id.* ¶ 322, at 70.

2. Had it applied the proper standard, the court of appeals would have affirmed the award of summary judgment to the wholesalers. The Seventh Circuit did not take issue with *any* of the district court's specific factual findings: that the wholesalers "were not consulted about the no-discount policies prior to or during their implementation"; that "no evidence exists that the wholesalers' position was considered by or carried any weight with the manufacturers"; that the wholesalers "had nothing whatsoever to do with the adoption of the 'no discount to retail pharmacies' policies"; and that "[w]holesalers are not involved in the manufacturer's decision whether to extend discounts to any particular customer, the products

to be discounted, or the prices the manufacturer extends to such customers." App., *infra*, 80a, 82a. Instead, the court of appeals relied exclusively on what it characterized as "a number of instances in which officers of the defendant wholesalers urge manufacturers to hold the line against discounting to pharmacies and their buying groups, and pledge to adhere to the chargeback system." *Id.* at 29a.

But this is precisely the sort of "ambiguous evidence" held insufficient in *Matsushita* and *Monsanto* to establish an antitrust conspiracy. The "urg[ings]" cited by the court of appeals are surely no more probative of unlawful agreement than the "numerous complaints from competing * * * distributors" about "price cutters" that the Court in *Monsanto* held inadequate (standing alone) to support the plaintiff's claim (465 U.S. at 759, 763); even if the Seventh Circuit's characterization of the evidence is accurate, such unilateral "urgings" surely do not establish the requisite " 'meeting of minds in an unlawful arrangement.' " *Id.* at 764 (quoting *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946)). Similarly, the Seventh Circuit's reliance on "pledge[s] to adhere to the chargeback system" disregards this Court's express declaration in *Monsanto* that "the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." *Id.* at 761. While the Court ultimately affirmed the verdict for the plaintiff in *Monsanto* on the ground that "there was substantial *direct* evidence of agreements to maintain prices" (*id.* at 765 (emphasis in original)), the Seventh Circuit pointed to no such evidence in this case. The district court's more extensive consideration of the issue found that there was no evidence *at all* that the wholesalers had conspired with the manufacturers, no reason to believe that the wholesalers were aware that the chargeback system "was the product

of an illegal conspiracy" (App., *infra*, 88a), and nothing to suggest that the wholesalers did anything more than implement policies imposed upon them by their suppliers.

For these reasons, the court of appeals' approach in this case threatens to "deter or penalize perfectly legitimate conduct" in exactly the manner feared by this Court in *Monsanto*. 465 U.S. at 763. The Court there emphasized that

> the fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions. A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market.

Id. at 762. The Court also recognized that

> distributors are an important source of information for manufacturers. In order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently. * * * In sum, "[t]o permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of its independent business judgment and emasculate the terms of the statute."

Id. at 763-764 (citation omitted). The court of appeals' holding here cannot be squared with that understanding.[11]

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[11] In fact, the court below in effect applied the very standard that *it* announced – and this Court firmly rejected – in *Monsanto*. See 465 U.S. at 759, 763-764. In its *Monsanto* opinion,

The Seventh Circuit committed a related legal error in *disregarding* evidence that undermined the plaintiffs' claims. The district court catalogued in detail voluminous "compelling" evidence that it characterized as "objective and uncontroverted" and that was flatly inconsistent with any inference of conspiracy. App., *infra*, 80a, 92a. This evidence is not irrelevant to the availability of summary judgment, as the court of appeals seemed to believe. *Id.* at 29a-30a. To the contrary, this Court has noted that "an overwhelming amount of * * * contrary evidence" should preclude a reasonable jury from finding that a conspiracy was more likely than not, even if evidence in the case otherwise might have sufficed to present a jury question. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 277 (1968). See 2 P. AREEDA & H. HOVENKAMP, *supra*, ¶ 322, at 68. The Court returned to the point in *Matsushita*, disapproving the denial of summary judgment based on "some metaphysical doubt as to the material facts" where "the record taken *as a whole* could not lead a rational trier of fact to find for the non-moving party." 475 U.S. at 586-587 (emphasis added). The Court made clear that summary judgment should be granted unless

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the Seventh Circuit did not consider whether the reasonable inferences from the defendants' conduct were as consistent with independent action as with conspiracy; instead, it denied judgment notwithstanding the verdict on the ground that "the jury was not required to accept Monsanto's version of the case." *Spray-Rite Service Corp* v. *Monsanto Co.*, 684 F.2d 1226, 1239 (7th Cir. 1982). In this case, the Seventh Circuit likewise failed to consider whether the evidence was as consistent with the wholesalers' explanation (that they adapted to conditions unilaterally imposed by the manufacturers) as with the plaintiffs' theory of wholesaler participation in a price-fixing conspiracy. Echoing the rejected passages in its *Monsanto* opinion, the Seventh Circuit denied summary judgment because the innocent inferences "are not *inevitable*." App., *infra*, 30a (emphasis added).

"the inference of conspiracy is reasonable *in light of the competing inferences of independent action.*" *Id.* at 588 (emphasis added).

The legal issue presented by this petition thus is dispositive of the wholesalers' involvement in this case. Applying the proper standard, the district court granted summary judgment; applying a more relaxed standard, the court of appeals denied summary judgment. This case accordingly presents a particularly appropriate vehicle with which to address the meaning of *Matsushita*.

C. The Issue Presented Here Is An Important And Recurring One

The necessity of review by this Court is especially acute because the issue presented in this case is a recurring one of enormous practical importance. The rule adopted by the court below (and by the circuits that apply a similarly lax standard) will affect the outcome of a great many cases – cases that (like this one) often will have tremendous significance in and of themselves. Moreover, the unfortunate effects of this rule are magnified by the conflict among the courts of appeals. Disagreement in the lower courts will lead to disparate results in similar cases. And because many significant antitrust suits involve multiple parties or national class actions, the conflict encourages forum shopping by plaintiffs who are able to seek out circuits where the governing standard departs from *Matsushita*. The current uncertainty in the law is intolerable in an area with such nationally significant economic and legal ramifications.

The consequences of applying the lower standard are predictable. Obtaining pretrial dismissal of insubstantial antitrust cases is particularly important because, as the court below itself recognized, there is great "potential for jury confusion in litigation as enormous and esoteric as a billion-dollar antitrust damages action." App., *infra*, 30a.

Given the possibility of unpredictable and unjustified verdicts – which would then be trebled – innocent defendants inevitably will be induced to acquiesce in coercive settlements. That prospect, in turn, will affect the primary activities of businesses, which will have no choice but to avoid what the Court in *Monsanto* termed "perfectly legitimate conduct" (465 U.S. at 763) for fear of incurring antitrust liability.

Indeed, the approach taken by the court below in this case often will discourage *procompetitive* activities. That is the case here: had the wholesalers refused to participate in the chargeback system, and had the manufacturers responded by dealing directly with institutional buyers, the wholesalers would have deprived consumers of the acknowledged efficiencies of their distribution network. Moreover, future concerns about antitrust liability likely will prompt distributors to more vigorously resist discounts to *any* customers, lest disparate treatment of purchasers prompt a claim of price-fixing like the one in this case. Thus, as the Court noted in *Matsushita*, "mistaken inferences in cases such as this one are especially costly, because they chill the very conduct that the antitrust laws are designed to protect." 475 U.S. at 594.

This development is especially pernicious because the Seventh Circuit's holding greatly increases the likelihood of subjecting to burdensome antitrust litigation all persons in a vertical relationship with third parties whose allegedly anticompetitive conduct is the focus of a complaint. In such situations, the existence of *some* agreement, and some form of acquiescence in the allegedly anticompetitive policies of the third parties, is inevitable. That is why the Court in *Monsanto* held that an antitrust action cannot succeed unless there is evidence tending to exclude the possibility that the anticompetitive policy was the product of an agreement *that crossed the levels of the vertical relationship*; the Court emphasized that "there is a basic distinction between concerted and independent

action – a distinction not always clearly drawn by parties and courts." 465 U.S. at 761. The conflict in the circuits casts doubt on this principle, even though, "given the ubiquity of vertical agreements, we need to be clear on which ones should be of concern to antitrust law." P. AREEDA & H. HOVENKAMP, *supra*, ¶ 1437′, at 619 (1997 Supp.).

The approach taken by the court below also has implications for other, related antitrust doctrines. As this case demonstrates, the question of what evidence suffices to maintain a claim of vertical conspiracy may determine whether an action brought by plaintiffs who lack standing under *Illinois Brick* will be dismissed before trial. The plaintiffs in this case are transparently attempting to evade *Illinois Brick* by roping the wholesalers into the suit through the use of chimerical evidence of a conspiracy. If the decision below is allowed to stand – in a significant and high-profile case – similar devices to nullify the limitations on standing in antitrust cases are likely to proliferate.

CONCLUSION

The petition for a writ of certiorari should be granted.

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In the
United States Court of Appeals
for the Seventh Circuit

Nos. 96-2814, 96-2458, 96-2485 & 97-2156

IN RE BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION

APPEALS OF ROBERT A. HUGGINS, *et al.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
MDL No. 997 – **Charles P. Kocoras, *Judge.***

Argued June 25, 1997 – Decided August 15, 1997.*

Before POSNER, *Chief Judge,* and BAUER and DIANE P. WOOD, *Circuit Judges.*

POSNER, *Chief Judge.* We have consolidated for decision four appeals (in two of which we have jurisdiction under 28 U.S.C. § 1292(b) and in the other two under 28 U.S.C. § 1291 and Fed. R. Civ. P. 54(b)) from rulings in a huge price-fixing litigation that the Judicial Panel on Multidistrict Litigation has consolidated in the Northern District of Illinois for pretrial proceedings. The consolidation covers hundreds of separate cases (a number of them class actions) brought under section 1 of the Sherman Act, 15 U.S.C. § 1, by retail pharmacies against manufacturers and wholesalers of prescription drugs. The pharmacies complain that the defendants have conspired among themselves to deny all pharmacies, including

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* The decision is being released in typescript.

chains and buying groups, discounts off the list price of brand-name drugs that the manufacturers sell to the wholesalers and that the wholesalers in turn resell to the pharmacies. A brief sketch of the operation of the alleged conspiracy will provide the essential background to understanding the issues presented by these appeals.

While refusing to give pharmacies any discounts, the defendants give steep discounts to favored classes of customers, including hospitals, health maintenance organizations, nursing homes, and mail-order companies. The defendants maintain this differential pricing through a "chargeback" system. Under that system, the manufacturer makes a contract with the favored customer establishing a discounted price at which the customer is entitled to buy from wholesalers; the wholesaler sells to the favored customer at that price; and the manufacturer then reimburses the wholesaler for the difference between the regular wholesale price and the discounted price. So if the manufacturer's regular price to the wholesaler for some drug is $100 and the contractually agreed upon discounted price for a favored customer is $75, the wholesaler will pay the manufacturer $100 for the drug but resell it to the favored customer at $75 and bill the manufacturer $25. The plaintiffs claim that the purpose of the chargeback system is to make it difficult for the favored customers to engage in arbitrage, that is, to buy more than they need and resell the surplus to pharmacies at a price between the discounted price that the favored customers pay and the higher, undiscounted wholesale price that nonfavored customers pay. The chargeback system permits the wholesalers to buy cheap only when they

are reselling to someone whom the manufacturer wants to be given a discount.

The defendants' differential pricing of their drugs is discriminatory in the technical economic sense – it involves charging different prices for the same goods, the differences being unrelated to savings in the costs of serving the favored customers. When the lower of two discriminatory prices covers the seller's cost, the higher price must exceed that cost. This creates an incentive for the favored purchasers to order more of the good than they need for their own use and to sell the surplus to disfavored customers at a price somewhere in between the seller's different prices. For example, an $80 resale by a hospital or other favored customer that had bought at $75 to a pharmacy that had bought at $100 would make both parties to the resale better off; the hospital would have a profit of $5 and the pharmacy would obtain a cost savings of $20. This is arbitrage and would erode the two-price system. The chargeback system prevents arbitrage; the wholesaler who resold to a pharmacy at a significant discount would incur a loss, since he would not be able to charge back any part of the discount to the manufacturer. Although a federal statute forbids hospitals and other providers of health care to resell to other sellers the pharmaceutical drugs that they buy, the statute does not cover all the favored customers for such drugs. 21 U.S.C. § 353(c)(3). Anyway statutes are not always fully obeyed. The chargeback system fills the gap in the statute's coverage and does not require heavy enforcement costs.

The presence of price discrimination in the economic sense is evidence of the presence of monopoly power – the power to raise price above cost without losing so

many sales as to make the price rise unsustainable. If the lower price covers the seller's cost, the higher price must exceed it; so competition must be weak or absent, because it has failed to force price down to cost (including in "cost" a reasonable return on investment). Since monopoly power can be created by collusion among competing sellers, the existence of industry-wide price discrimination is some evidence of collusion. But it is not conclusive evidence, especially in an industry such as pharmaceuticals many of the products of which are patented. The sellers may be selling goods that although close substitutes are not perfect substitutes, with the result that each seller has some monopoly power and therefore can price discriminate unilaterally. It might want to do so to take advantage of the fact that some consumers are less able to resist high prices than others. A fully developed record might show, in accordance with contested evidence in the record compiled to date, that a pharmacy has little choice but to buy a wide range of competing drugs because it cannot know in advance which drug its customers' doctors will prescribe. An HMO, however, can (within limits) tell the doctors it employs what drugs to prescribe, and it can use that power to extract price concessions from the individual manufacturers, who naturally however do not wish to extend the concessions to captive consumers such as the pharmacies.

In the extensive pretrial proceedings that have been conducted to date in this litigation, the plaintiffs have presented evidence that the defendant manufacturers agreed among themselves, and also with the defendant wholesalers, to refuse discounts to pharmacies and to

make this refusal stick by adopting the chargeback system in order to prevent arbitrage. In other words, the claim is that pervasive price discrimination in the pharmaceutical market is the result not of individual decisions by manufacturers who possess some monopoly power but of an agreement to practice price discrimination. The plaintiffs' objection is not to the discrimination as such; although there is a Robinson-Patman claim in the complaint, it is not part of the appeal. The plaintiffs' objection is to having to pay high prices that, but for the defendants' alleged conspiracy, would be brought down by competition.

One might have supposed that if the defendants were going to collude on price, they would go the whole hog and agree not to provide discounts to the hospitals and other customers favored by the discriminatory system. But the defendants' cartel – if that is what it is – may not be tight enough to prevent hospitals and other bulk purchasers with power to shift demand among different manufacturers' drugs from whipsawing the members of the cartel for discounts; or maybe these purchasers could shift demand to manufacturers that are not members of the cartel. If, for whatever reason, the elasticity of demand for a cartel's product differs among groups of purchasers, a single cartel price will not be profit-maximizing unless a discriminatory price scheme cannot be enforced at reasonable cost.

The manufacturers moved for summary judgment, arguing that there wasn't enough evidence of collusion to warrant a trial. The district judge denied the motion. The correctness of his ruling is not before us. And whether it was correct or not, the reader should bear in mind that

the manufacturers have not been found to have violated the Sherman Act; the only determination is that there is enough evidence of a violation to require that the case be allowed to proceed to trial.

The judge granted summary judgment to one of the manufacturers, however, DuPont Merck Pharmaceutical Company. The plaintiffs' appeal from that ruling is one of the four appeals before us. The judge also granted summary judgment to the wholesaler defendants because he thought there was insufficient evidence of their participation in the manufacturers' conspiracy to warrant a trial. That is another ruling appealed from. Another is the judge's refusal to dismiss indirect-purchaser claims by pharmacies that paid overcharges as a consequence of the alleged manufacturers' conspiracy. The manufacturers argued unsuccessfully that only the first tier of purchasers ("direct purchasers"), composed of the wholesalers and others who purchased drugs directly from the manufacturers, and not the second tier, composed of pharmacies that purchased the manufacturers' drugs from the wholesalers ("indirect purchasers"), are permitted to bring a suit for overcharges under the Sherman Act. In the last ruling that has been appealed to us, the judge refused to remand a class action that alleges violations not of the Sherman Act but of Alabama's antitrust statute, which expressly authorizes suits by indirect purchasers.

The indirect-purchaser issue (with which we begin) is separate from the issue of the wholesalers' participation in the manufacturers' alleged conspiracy. It is true that if we reversed the judge's ruling on the latter issue and so

reinstated the wholesalers as defendants, and if the plaintiffs went on to obtain a judgment against the wholesalers and manufacturers, any indirect-purchaser defense would go by the board, since the pharmacies would then be direct purchasers from the conspirators. *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980); *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1212-13 (9th Cir. 1984); see also *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979) (requiring that the direct sellers, here the wholesalers, be joined as defendants – but that requirement is satisfied). But even if we do reinstate the wholesalers as defendants, an issue discussed later in this opinion, the plaintiffs may fail at trial to establish their liability, in which event the indirect-purchaser issue will be decisive. So, the issue being fully briefed and argued in this court, we should decide it; and the fact that it may in the end not prove decisive does not show that the district judge and we were wrong to certify his ruling on the issue under 28 U.S.C. § 1292(b) (interlocutory appeal of a ruling on a controlling question) for an immediate appeal. *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 658-59 (7th Cir. 1996); *Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974); 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3930, pp. 426-27 (2d ed. 1996).

A brief review of the evolution of the indirect-purchaser doctrine in the Supreme Court will point us toward a resolution of the issue. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the defendant in a Sherman Act suit, a manufacturer of

machinery for making shoes, defended on the ground that the plaintiff, a shoe manufacturer that had bought the defendant's machinery, had passed on any monopoly overcharge to its own customers, the wholesale purchasers of its shoes, and hence had not been injured. A firm hit with an increase in the cost of one of its inputs will try so far as competition allows to pass that cost on to its customers in the form of a higher price for its product. The Supreme Court held, however, that an antitrust defendant would not be permitted to defend against a damages suit on the ground that the plaintiff had shifted the cost of the defendant's wrongdoing to the plaintiff's customers. Such a defense would complicate antitrust enforcement by requiring an apportionment of damages between different tiers of purchasers of the defendant's product. Tracing a price hike through successive resales is an example of what is called "incidence analysis," and is famously difficult.

The Court took the next step in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and held that the second or subsequent tiers, the indirect purchasers from the antitrust violators, couldn't sue; only the first tier could. This was a logical corollary of the rejection of the passing-on defense in *Hanover Shoe*, since to determine the damages suffered by subsequent tiers of purchasers would require the very apportionment of damages that the Court had rejected in the earlier case.

Illinois Brick left unclear whether there might be exceptions for cases in which the amount of the overcharge that was passed on to a lower tier of purchasers could be determined simply and with mechanical precision. A plausible example, we thought, would be a case in

which the first tier of purchasers consisted of public utilities that as a consequence of government regulation passed on any cost increase dollar for dollar to their customers. *Illinois v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir. 1988) (en banc). Shortly afterward, in a similar case, the Supreme Court held that such cases are not within any exception to the *Illinois Brick* doctrine, *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), and we duly overruled our *Panhandle* opinion. *Illinois v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991). *Utilicorp* implies that the only exceptions to the *Illinois Brick* doctrine are those stated in *Illinois Brick* itself – "where the direct purchaser is owned or controlled by its customer," 431 U.S. at 736 n. 16 or, we suppose, vice versa. The first exception (ownership) is conceded to be inapplicable here; the wholesalers are not corporate affiliates of the manufacturers. The second (control) is inapplicable as well. The manufacturers do not control the wholesalers through interlocking directorates, minority stock ownership, loan agreements that subject the wholesalers to the manufacturers' operating control, trust agreements, or other modes of control separate from ownership of a majority of the wholesalers' common stock. *Jewish Hospital Ass'n v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 975 (6th Cir. 1980); cf. *Gould v. Ruefenacht*, 471 U.S. 701, 705 (1985).

The district judge held, however, primarily on the basis of the chargeback system, that the wholesalers are really nothing more than "glorified warehouses" of the manufacturers. In so ruling, the judge gave undue weight to the chargeback system. The favored customers, the ones who had contracts with the manufacturers though

they took delivery from the wholesalers, are not parties to this litigation. They certainly are not complaining about the system of discriminatory pricing. They were not overcharged, and their right if any to recover overcharges in a suit against the manufacturers is not in issue. The plaintiffs are the disfavored customers. They did not have contracts with the manufacturers, they did not receive discounts, and the wholesalers did not receive chargebacks on sales to them. The plaintiffs' complaint is that they were overcharged because the wholesalers passed on to them the overcharge that the wholesalers had to pay the manufacturers by virtue of the price-fixing conspiracy. This is just the kind of complaint that *Illinois Brick* bars. The only entities permitted to complain about the manufacturers' overcharging the wholesalers are the wholesalers themselves, the direct purchasers, even if every cent of the overcharge was promptly and fully passed on to the pharmacies in the form of a higher wholesale price.

Some wholesalers were plaintiffs in this litigation; they settled. Had they not done so, and had the case proceeded to trial and the pharmacies been permitted to seek damages for the amount of the overcharge passed on to them, the court would have had to apportion the overcharge between the wholesalers and the pharmacies. That's just what the Supreme Court in *Hanover Shoe*, *Illinois Brick*, and *Utilicorp* told the federal courts not to do.

We can imagine the present case reconfigured in a way that might take it out of the orbit of these decisions; it would not be a matter of carving a further exception. A

number of pharmacies have tried to improve their bargaining position vis-a-vis the drug manufacturers by forming buying groups. The bigger a buyer is, the more likely it is to be able to obtain a discount from a member of a cartel, since the volume of its purchases may compensate the member for endangering the cartel by granting a discount. George J. Stigler, "A Theory of Oligopoly," in Stigler, *The Organization of Industry* 39, 43-44 (1968). That is one motive for forming a buying group. The manufacturers have been steadfast in refusing to grant discounts to such groups. If this refusal, taking as it does the form of a refusal to enter into direct contractual relations with certain retailers, such as the manufacturers have with their favored customers, were successfully challenged as a boycott, see *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458-59 (1986); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 479 (7th Cir. 1988), the *Illinois Brick* rule, which is a rule concerning overcharges, would fall away. The plaintiffs would be permitted to prove up whatever damages they could show had flowed from the boycott, *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 585 n. 47 (3d Cir. 1979), provided they weren't seeking to recover overcharges, for that would entail the very incidence analysis that *Illinois Brick* bars. *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 966-68 and n. 21 (3d Cir. 1983). But that is precisely what they *are* seeking. The certified class is of pharmacies that paid overcharges, and the certification was based on the uniformity of the harm. It would be more difficult to justify class treatment of a boycott of buying groups. Compare *White Industries, Inc.*

v. Cessna Aircraft Co., 845 F.2d 1497, 1502-03 (8th Cir. 1988), with *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. 1977). That may be why the plaintiffs have not cast their case in the boycott mold. We need not decide whether it is still open to them to do so in the district court.

To conclude our discussion of the drug manufacturers' federal antitrust liability to the indirect purchasers, the federal class actions should have been dismissed unless the wholesalers should not have been dropped as defendants, an issue we take up later. The Alabama class suit, which the district judge refused to remand, also involves the indirect-purchaser question; so let us turn to that suit. It was actually the second prescription-drug price-fixing suit brought in the Alabama state courts. The first had been removed to federal district court under the diversity jurisdiction and then transferred by the multidistrict panel to the Northern District of Illinois for consolidation with the other prescription-drug price-fixing suits. The district court had denied a motion to remand, so the suit remains in that court. Then our Alabama suit was filed, and like the first suit it was removed to federal district court and transferred to the Northern District of Illinois. It is a class suit on behalf of consumers in several states, not only Alabama, and it names as defendants a large number of drug manufacturers none of which either is a citizen of Alabama or sells exclusively to that state's residents. The suit is based, or at least purports to be based, on an Alabama statute that is modeled on the Sherman Act but that contains a provision which expressly authorizes indirect-purchaser claims – the very type of claim that *Illinois*

Brick bars in suits under the Sherman Act. Ala. Code § 6-5-60(a). The defendants argued, and the district court agreed, that the suit is removable to federal court under both the diversity statute and, by virtue of the doctrine of "artful pleading," the federal-question statute as well. 28 U.S.C. §§ 1331, 1332.

There is complete diversity of citizenship among the parties; the question, so far as the issue of diversity jurisdiction is concerned, is only whether the minimum amount in controversy required to maintain a diversity suit in federal court ($50,000 at the time the suit was filed) is present. The court cannot just add up the damages sought by each member of the class. *Snyder v. Harris*, 394 U.S. 332 (1969); *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973); *In re Corestates Trust Fee Litigation*, 39 F.3d 61, 64 (3d Cir. 1994). At least one named plaintiff must satisfy the jurisdictional minimum. If he does, the other named plaintiffs and the unnamed class members can, by virtue of the supplemental jurisdiction conferred on the federal district courts by 28 U.S.C. § 1367, piggyback on that plaintiff's claim. That is, they remain plaintiffs, or unnamed members of the class, as the case may be, even though their own claims are for less than the jurisdictional minimum amount. So the Fifth Circuit held in *In re Abbott Laboratories*, 51 F.3d 524, 527-29 (5th Cir. 1995), and we signified our agreement with that holding in *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930-33 (7th Cir. 1996), and repeat it today.

The plaintiffs in this case, however, because they did not want their case removed to federal court, were careful to plead that the damages sought by each did not exceed $50,000. This is plausible – you would have to buy an

awful lot of expensive drugs to run up a bill the overcharge portion of which alone was more than that amount. And plausible or not, a plaintiff can always stay under the minimum amount in controversy by waiving his right to more, *In re Amino Acid Lysine Antitrust Litigation*, 918 F.Supp. 1181, 1185-86 (N. D. Ill. 1996), though these plaintiffs have not established that they did mean to waive their right.

Compensatory damages, which we have just seen are not likely to exceed $50,000 for any of the named plaintiffs, are not the only form of monetary relief sought, however. The antitrust statute on which the Alabama class action is based authorizes the court to award up to $500 for each "instance of . . . injury or damages" as a statutory penalty, in addition to any compensatory damages. Ala. Code § 6-5-60(a). But the defendants cannot simply wave the statute in our faces. They have the burden of establishing federal jurisdiction when they seek to remove a case from state to federal court, and so they must present *evidence* of federal jurisdiction once the existence of that jurisdiction is fairly cast into doubt. *Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 427 (7th Cir. 1997); *Wellness Community-National v. Wellness House*, 70 F.3d 46, 49 (7th Cir. 1995); *Selcke v. New England Ins. Co.*, 2 F.3d 790, 792 (7th Cir. 1993). It was cast into doubt here by the complaint itself, which does not allege stakes in excess of $50,000 or facts from which such stakes can readily be inferred. Yet the defendants presented no evidence that, even with the statutory penalty added to the compensatory damages sought, any of the named plaintiffs is asking for more than $50,000. The defendants point out that it is *possible* that at least one of

the plaintiffs had more than $50,000 in damages and penalties. A hundred purchases within the four-year period covered by the complaint would carry a purchaser over the threshold, even if the overcharge on each purchase was tiny, because each purchase, constituting we assume a separate "instance of . . . injury or damage," would entitle the purchaser to the $500 statutory penalty. But the defendants put in no evidence that any of the named plaintiffs in fact made this many purchases. Instead they argue that under Alabama law the *entire* statutory penalties awarded in a case are the indivisible penalty for a defendant's misconduct and so are the stakes in *each* of the plaintiffs' claims. If this is correct, and the plaintiffs have not waived a claim for total damages (compensatory damages plus the penalty) per plaintiff of more than $50,000, then the defendants had no need to present any evidence on the jurisdictional issue.

In arguing their interpretation of the Alabama statute, with the support of *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1359 (11th Cir. 1996), and less directly of *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1334 (5th Cir. 1995), but in opposition to *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1428-31 (2d Cir. 1997), the defendants are gesturing toward the Supreme Court's statement in *Snyder v. Harris, supra*, 394 U.S. at 355 that when "two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest," the amount in controversy is the aggregate in which they each have their undivided share. An example is an action by the heirs of an intestate estate against the estate's administrator. A successful prosecution of the action would result in making the estate larger, and each heir

would have an undivided interest in the larger, as in the original, estate. *Shields v. Thomas*, 58 U.S. (17 How.) 3, 15 L.Ed. 93 (1855). Other examples are set forth in *Gilman v. BHC Securities, Inc., supra*, 104 F.3d at 1423.

This is not such a case. The penalty prescribed by the Alabama statute is presumably per violation, that is, per sale at an unlawful price; and it is awarded to the victim of the particular violation, the direct or indirect buyer, rather than to the victims of the price-fixing conspiracy as a group or to a representative member of the group. If one plaintiff disclaimed the penalty awarded him under the statute, or settled with the defendant for an amount that included no penalty, the penalty thus forsworn would not go to another plaintiff; it would be subtracted from the total amount of penalties assessed against the defendant. Indeed, if the court had awarded the maximum penalty to each victim, it would be *impossible* for the court to shift the disclaimed penalty to another of the victims; to do so would pierce the ceiling. But we take it that even if one victim had received $300 rather than $500, the court would not give him another $200 if another victim had disclaimed his own $300 penalty.

It is possible we suppose that the judge could fix some amount that represented in his mind the proper punishment for the defendant's misconduct; divide that amount by the number of plaintiffs; and if the result of the division was greater than $500, cut down the aggregate accordingly. But even if, in acting so, the judge would be complying with the spirit as well as the letter of the statute, the resulting fund would not be a piece of property to which the plaintiffs had undivided rights. None of the victims would have an undivided right in a

common fund or *res* such that if one claimant fell out the others' shares would grow. *Sellers v. O'Connell*, 701 F.2d 575, 579 (6th Cir. 1983); *Eagle Star Ins. Co. v. Maltes*, 313 F.2d 778, 781 (5th Cir. 1963).

A plaintiff's award of punitive damages is not limited by awards made to previous plaintiffs complaining of the same act of the defendant. E.g., *Allen v. R & H Oil & Gas Co., supra*, 63 F.3d at 1334; *Dunn v. Hovic*, 1 F.3d 1371, 1385-86 (3d Cir. 1993); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-41 (2d Cir. 1967) (Friendly, J.). This rule has been criticized (as by Judge Friendly in *Roginsky*), but whether it is a good rule or a bad rule it shows that the right to punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victims of the defendant's misconduct. *Gilman v. BCH Securities, Inc., supra*, 104 F.3d at 1428-31. The rule may have to be qualified now that the Supreme Court has held that excessive awards of punitive damages violate the due process clause. *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 116 S. Ct. 1589 (1996). For it could be argued that a piling on of awards by different courts for the same act might result in excessive punishment for that act. We need not decide whether this argument would ever succeed; it is unlikely to succeed to the point of converting entitlements to punitive damages from individual to collective entitlements.

That the defendants have failed to show that the plaintiffs are seeking more than $50,000 apiece against each defendant cannot be the end of our analysis of diversity jurisdiction. The complaint seeks an injunction against the alleged conspiracy as well as damages and the penalty, and the defendants argue that it will cost them

more than $50,000 to comply with the injunction even though the only plausible form of injunctive relief in a case like this would be to order the defendants to stop fixing prices. There are four ways in which a request for an injunction might be thought to carry a case over the amount in controversy threshold. The first way – plainly *one* valid way, e.g., *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 347 (1977); *Gould v. Artisoft, Inc.*, 1 F.3d 544, 548 n. 4 (7th Cir. 1993); *Justice v. Atchison, Topeka & Santa Fe Ry.*, 927 F.2d 503, 505 (10th Cir. 1991); *Smith v. Washington*, 593 F.2d 1097, 1099 (D.C. Cir. 1978), and some courts think the *only* valid way, *Kheel v. Port of New York Authority*, 457 F.2d 46, 49 (2d Cir. 1972); *Bernard v. Gerber Food Products Co.*, 938 F.Supp. 218, 220-22 (S.D.N.Y. 1996) – is if the value of the injunction to the plaintiff exceeds the statutory minimum. So we could look to the present value of the future cost savings that each plaintiff anticipated from the cessation of each defendant's price fixing. No effort to quantify this value or array of values in even the roughest terms has been made, however, so we put it to one side.

Although one of our cases adopts the "plaintiff only" position, *Freeman v. Sports Car Club of America, Inc.*, 51 F.3d 1358, 1362 (7th Cir. 1995), it overlooked a decision in which we had squarely rejected that position in favor of the "either viewpoint" (plaintiff's or defendant's) approach, *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389 (7th Cir. 1979). Looked at from the defendants' standpoint, the minimum amount in controversy would be present if the injunction sought by the plaintiffs would require some alteration in the defendant's method of doing business

that would cost the defendant at least the statutory minimum amount. See, e.g., *id.* at 391. This ground is not argued either. Often it will be equivalent to the previous ground, the value of the injunction to the plaintiff. The defendant would be willing to pay the plaintiff up to a shade less than the cost that the injunction would impose on the defendant to induce the plaintiff to abandon his quest for injunctive relief. In that way the cost to the defendant would be transmuted into an equivalent value to the plaintiff. If, however, there are multiple plaintiffs, actual or potential, the defendant will not be willing to pay each one as much as he would if there were only one possible plaintiff. It may seem paradoxical to defeat removal in the multiplaintiff setting on this basis. But it is implicit in the rule that forbids aggregation of class members' separate claims that it will sometimes be more difficult for a defendant desiring to remove a diversity case to federal court to establish the minimum amount of controversy in a multiplaintiff case than in a much smaller single-plaintiff case. Compare a class action in which one million class members each has a claim worth $1 with a case in which a single plaintiff has a claim worth $100,000. There is diversity jurisdiction in the second case but not (because of the nonaggregation rule in class actions, the rule of *Snyder* and *Zahn*) the first.

Concern has been expressed that if the cost to the defendant may be used to establish the minimum amount in controversy in an injunction case, it may be used for this purpose in a damages case, and then the nonaggregation rule will be circumvented. E.g., *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1050 (3d Cir. 1993). The concern is misplaced. Whatever the form of relief sought, each

plaintiff's claim must be held separate from each other plaintiff's claim from both the plaintiff's and the defendant's standpoint. The defendant in such a case is deemed to face multiple claims for injunctive relief, each of which must be separately evaluated. *Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977). The question then becomes, as with the penalty statute, whether each plaintiff is asserting an individual right or, rather, a right to an undivided interest in something. In this case it is the former. Each plaintiff has a right to be free from the indirect effects of collusive pricing. Moreover, the grant of an injunction in favor of a single plaintiff would be unlikely to impose a heavy cost on any of the defendants; each defendant could continue in its own way of pricing with respect to all other plaintiffs. The test, we repeat, is the cost to each defendant of an injunction running in favor of one plaintiff; otherwise the nonaggregation rule would be violated.

Still another way in which the requirement of the statutory minimum amount in controversy can be satisfied in an injunctive case is by showing that the injunction would force the defendant to forgo a benefit to him that is worth more than the threshold amount specified in the diversity statute, e.g., *Grotzke v. Kurz*, 887 F. Supp. 53 (D.R.I. 1995), as where the suit asks that the defendant be enjoined from completing a lucrative transaction. That is not argued here either. The reason may be that while an injunction against price fixing might prevent a defendant from engaging in lucrative unlawful transactions, it would not deprive the defendant of a *legally protected* interest. It would not be like the case in which the defendant, in order to extirpate the effects of its unlawful act,

is forced to restructure its operations at a cost that may greatly exceed any profit it made from the act. Structural relief is frequently decreed in merger cases under section 1 of the Sherman Act or section 7 of the Clayton Act or in monopolization cases under section 2 of the Sherman Act, but very rarely in a price-fixing case, such as we have here.

The last way of satisfying the requirement of the minimum amount in controversy in an injunction case, the way principally argued by the defendants, is that a defendant's clerical or ministerial costs of compliance might carry a case across the threshold. Even if an injunction doesn't require the defendant to restructure its business or give up a lucrative lawful business opportunity, but merely tells it to stop doing something illegal, such as conspiring to fix prices, there will be lawful costs of compliance. Just the cost of duplicating an injunction in a case such as this and distributing the copies to all the relevant personnel might exceed $50,000 for each defendant, and, if so, this would argue for allowing removal to federal court. The argument would be the same as before – given the possibility of a settlement, a suit is worth as much to the plaintiff in the form of an expected value of settling it as it is costly to the defendant, at least in the single-plaintiff case. But if the argument were accepted, then every case, however trivial, against a large company would cross the threshold, whether the threshold was $50,000 or as it now is $75,000, even if the plaintiff were asking for an injunction against disclosing his unlisted telephone number. It would be an invitation to file state-law nuisance suits in federal court. We needn't bite this bullet. The defendants have made no effort to show that

what is conceivable is also probable by quantifying the internal cost of compliance to each of them and then adding it to a plaintiff's compensatory damages and penalty entitlement.

The alternative basis on which the district court permitted the removal of the Alabama suit to the federal district court was the "artful pleading" doctrine. The doctrine is usually taken to mean that if federal law has so far occupied a field of disputes as to extinguish any basis in state law for seeking a resolution of the dispute, a plaintiff cannot prevent removal by casting his claim as one under state law – it must actually be a claim under federal law because only federal law could supply a ground for relief. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393-94 (1987); *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968); *Kaucky v. Southwest Airlines Co.*, 109 F.3d 349, 351 (7th Cir. 1997). And as such it can be removed to federal court even if it is not within the diversity jurisdiction, and, by virtue of 28 U.S.C. § 1441(e) (added in 1986), even if the state court could not have exercised jurisdiction over the case because it is a type of case that is within the exclusive jurisdiction of the federal courts, as well as being a case in which only federal law can supply the rule of decision.

It may seem odd to allow removal and retention in such cases, rather than to trust the state court to dismiss a suit that is frivolous because it is based on nonexistent (because preempted) state law, especially since a defense of preemption is normally not a basis for removal and is therefore decided by the state court. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987); *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 24-27 (1983). The usual

explanation is that if the suit *must* be based on federal law because that is the only law that such a suit *can* be based on (the standard example is a suit to enforce a collective bargaining agreement, which can be litigated only under federal law), the defendant is entitled to remove and his entitlement should not be defeated by the plaintiff's evasive drafting of the complaint. E.g., *Bartholet v. Reischauer A.G. (Zürich)*, 953 F.2d 1073, 1075 (7th Cir. 1992). It's true that the defendant should be able to defeat this maneuver in state court by moving to dismiss the suit as frivolous; if the plaintiff countered by coming out of his state-law closet and acknowledging that he was trying to plead a federal case, the defendant could then remove. 28 U.S.C. § 1446(b). But should the defendant be put to the bother? If as a matter of fact the plaintiff is really intending to bring a federal suit though failing to cite federal law, it can be argued that his intentions should be taken as the reality and so the defendant allowed to remove what is functionally though not formally a federal suit.

The problem comes in setting limits to the doctrine. There are countless cases in which a suit under state law could be thought to be a federal suit in state clothing. Antitrust law, for example, with an isolated exception, *Flood v. Kuhn*, 407 U.S. 258, 284-85 (1972), is a field in which Congress has *not* sought to replace state with federal law. *California v. ARC America Corp.*, 490 U.S. 93, 101-02 (1989). The states are free to enact their own antitrust laws, reaching the same conduct as the federal laws except insofar as the states' power to regulate economic activities in other states is limited by the commerce and due process clauses of the federal Constitution. See

Herbert Hovenkamp, "State Antitrust in the Federal Scheme," 58 *Ind. L.J.* 375 (1983). This is a potentially significant qualification, as we shall see; but on the view taken by the defendants in this case, *any* time an antitrust plaintiff brings a suit in state court under a state antitrust statute that contains substantive provisions similar to that of a federal antitrust statute, the defendant can remove on the ground that the plaintiff is trying to bring a federal antitrust suit yet to insulate it from removal to a federal court.

This surprising possibility gets a boost from a footnote in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). The plaintiffs in that case brought a class suit in a state court under state fraud law and state unfair competition law. The suit was removed to federal district court, properly in the Supreme Court's judgment because the district court had found as a fact that the plaintiffs "had attempted to avoid removal jurisdiction by 'artful[ly]' casting their 'essentially federal law claims' as state-law claims." *Id.* at 397 n. 2. The suit had been filed after the district court had dismissed an earlier version, explicitly premised on federal antitrust law, on the basis of a federal defense that, like the "passing on" defense of *Illinois Brick*, the plaintiffs hoped would not be recognized by state law.

It is not easy to see why this is "artful pleading" in some invidious, evasive sense. Once the federal defense was held to block the plaintiffs' federal antitrust claim, their only hope was to proceed under state law. They had little motive to conceal a federal claim in state clothing, for their federal claim was dead. See *In re Application of County Collector*, 96 F.3d 890, 897 (7th Cir. 1996). It is the

same here. The only motive the plaintiffs in our Alabama case could have for filing a case under the Alabama statute was to avoid the federal passing-on defense of *Illinois Brick*, a defense they could avoid only if they pressed their claim exclusively under state law – and if they did that the case would belong in state court because, as we have seen, it is not within the diversity jurisdiction and so is not removable to federal court on that basis.

The Supreme Court went on to hold in *Moitie* that the "artful pleaded" (hence federal) claims that had been removed to federal court were barred by res judicata. The suit had been refiled in state court after final judgment had been entered against the plaintiffs in federal court. We can now see how the refiling of these suits in state court under state law could be thought "artful pleading" in an invidious sense; and the Court did not say it *was* artful pleading – only that it would not question the district court's finding that it was. The plaintiffs had been trying to dodge a federal court's judgment. The defendants could have set up the judgment as res judicata in the state court in which the suits were refiled. But if the sole basis for filing a state suit is to get around, however temporarily and hopelessly, a federal judgment, it can be argued that the new "state law" suit is really the old federal suit in a transparent guise and that the federal court ought to say so in order to get rid of it quickly and thus protect the federal judgment against the possibility that the state court might abet the plaintiff's effort to get around a dispositive defense or other fatal flaw in his federal case. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911-12 (7th Cir. 1993); *Rivet v. Regions Bank of Louisiana, F.S.B.*,

108 F.3d 576, 586 (5th Cir. 1997); *Ultramar America Ltd. v. Dwelle*, 900 F.2d 1412 (9th Cir. 1990). Furthermore, any state claim in *Moitie* had been extinguished by the federal judgment, by operation of the doctrine of merger. Recall that the Court held the claim barred by res judicata. The reason was that the claim could have been joined to the plaintiffs' federal claim and arose from the same cluster of facts. In these circumstances, since it was not joined, it merged into the federal judgment and disappeared, leaving nothing on which to base a suit in state court.

There is no federal judgment here. Neither when the Alabama suit was filed nor when the motion to remand was filed was there any ruling by the district court, let alone a judgment, barring the suit on *Illinois Brick* (or any other federal) grounds. On the contrary, the district court thought *Illinois Brick* not a bar to a federal antitrust suit by indirect purchasers. It is true that the judge had refused to certify the first Alabama suit removed to the district court as a class action, but the denial of class certification is not a final judgment, terminating the underlying suit; the suit continues, only as an individual action rather than as a class action.

The plaintiffs may well be stretching the Alabama statute to the breaking point in seeking damages for nonresident plaintiffs from nonresident defendants who sell primarily in other states. If it were clear that the plaintiffs could get no significant relief under Alabama law, this would strengthen the inference that they were merely recaptioning their federal suit as one under state law. But it is not clear, even though the defendants are able to cite Alabama cases which say that Alabama's antitrust statute is indeed limited to intrastate commerce

and it is doubtful that any of the price-fixed sales attacked in the suit took place in intrastate rather than interstate commerce. The cases on which the defendants rely, for example *Georgia Fruit Exchange v. Turnipseed*, 62 So. 542, 546 (Ala. 1913), date from a period in which, interstate commerce being narrowly defined, see, e.g. *Hadley-Dean Plate Glass Co. v. Highland Glass Co.*, 143 Fed. 242, 244 (8th Cir. 1906), and federal power to regulate such commerce being deemed exclusive, *id.*; *United States v. E.C. Knight Co.*, 156 U.S. 1, 11 (1895), a state statute limited to intrastate commerce would have some, albeit a strictly limited, scope and could not have a greater scope no matter how much the state wanted it to. The cases thus were not interpreting the statute; they were interpreting the Constitution as placing upper and lower bounds on the reach of the statute, and the Constitution has since been reinterpreted. If the statute is limited today as it once was to commerce that is not within the regulatory power of Congress under the commerce clause, it is a dead letter because there are virtually no sales, in Alabama or anywhere else in the United States, that are intrastate in *that* sense. *United States v. Lopez*, 115 S.Ct. 1624, 1630 (1995); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Hicks*, 106 F.3d 187, 189-90 (7th Cir. 1997). Other states read their antitrust statutes to reach what is now understood to be interstate commerce. E.g., *R.E. Spriggs v. Adolph Coors Co.*, 112 Cal. Rptr. 585 (1974); *Health Consultants, Inc. v. Precision Instruments, Inc.*, 527 N.W.2d 596, 607 (Neb. 1995) (citing cases). The reading is constitutionally permissible, *Clay v. Sun Ins. Office, Ltd.*,

377 U.S. 179 (1964), and we are given no reason to suppose that Alabama would buck this trend and by doing so kill its statute.

A state's power to regulate interstate commerce is limited, however, by the provisions of the federal Constitution that limit the extraterritorial powers of state government. A state cannot regulate sales that take place wholly outside it. *K-S Pharmacies, Inc. v. American Home Products Corp.*, 962 F.2d 728, 730 (7th Cir. 1992). State *A* cannot use its antitrust law to make a seller in State *B* charge a lower price to a buyer in *C*. Insofar as the Alabama suit challenges sales from plants or offices in other states to pharmacies in other states, it exceeds the constitutional scope of the Alabama antitrust law. But insofar as it challenges sales from other states to pharmacies in Alabama, it is within the intended and permissible scope of the statute, and, since there may well be a nontrivial number of such sales, the suit has enough potential merit as an Alabama antitrust suit to defeat the application of the "artful pleading" doctrine. The twist that *Moitie* gave to the doctrine is (very uncharacteristically for its author, Justice, now Chief Justice, Rehnquist) based on distrust of state courts, and, especially since it appears only in a footnote, should be narrowly construed in the interest of maintaining comity between the federal government and the states and keeping federal jurisdiction within the limits prescribed by Congress.

But the plaintiffs are wrong to argue that if their suit, if reconceived as a federal suit, is so plainly barred by *Illinois Brick* as to be frivolous, this would mean that it could not be removed to federal court because federal courts lack jurisdiction over frivolous federal claims. It is

quite true that a case can be so utterly lacking in merit that the proper disposition of it is dismissal under Rule 12(b)(1) of the civil rules (lack of subject-matter jurisdiction) rather than under Rule 12(b)(6) (failure to state a claim). See, e.g., *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974); *Korzen v. Local Union 705*, 75 F.3d 285, 289 (7th Cir. 1996). But it would be a considerable paradox if, the less merit a claim had, the more opportunity the plaintiff would have to restart the suit in another court. *Moitie* bars plaintiffs in hopeless federal cases from staving off the evil day of dismissal by shifting the case into a state court that may be confused about or even indifferent to the lack of merit of the case.

Although the issue must be considered a close one because of persisting uncertainty about the estimation of the amount in controversy in injunction cases and about the scope of the doctrine of artful pleading after *Moitie*'s footnote, we conclude that the motion to remand the Alabama suit should have been granted, and we move on to the question whether the wholesalers should have been dropped as defendants. Pretrial discovery included the taking of a thousand depositions and the production of *fifty million* pages of documents, and from this indigestible mass the plaintiffs have plucked a number of tasty morsels to garnish their briefs. We shall not extend this opinion with quotations. Suffice it to say that the record discloses a number of instances in which officers of the defendant wholesalers urge manufacturers to hold the line against discounting to pharmacies and their buying groups, and pledge to adhere to the chargeback system. The defendants argue that each of these "smoking guns" is susceptible of an innocent interpretation. But the

issue before us is not whether the wholesalers were in fact participants in the price-fixing conspiracy; it is whether there is sufficient evidence of this to create a jury issue. In deciding this question we must construe the evidence as favorably to the plaintiffs as the record permits, not as favorably to the defendants as it permits. The defendants' interpretations may be correct; they are not inevitable.

But they argue, pointing to *Matsushita* and other decisions by the Supreme Court and this court, that summary judgment for a defendant is proper, even if there is some evidence of an antitrust violation, if the plaintiff's theory of violation makes no economic sense. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 467-69 (1992); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 49 (7th Cir. 1992); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir. 1986). This has to be the right rule, given the potential for jury confusion in litigation as enormous and esoteric as a billion-dollar antitrust damages action. The wholesalers argue that it would have been contrary to their economic self-interest for them to have joined a conspiracy that prevents them from selling at discounted prices to the pharmacies. The lower the price at which they sell to the pharmacies, the larger their volume of sales, and if their markup is unaffected this will translate into larger gross and probably net revenues.

But this misconceives the plaintiffs' theory of the wholesalers' violation. The theory is that the wholesalers were the manufacturers' cats-paws. There is nothing new about the idea that a cartel might "hire" a customer to

help police the cartel. See Elizabeth Granitz & Benjamin Klein, "Monopolization by 'Raising Rivals' Costs': The Standard Oil Case," 39 *J.Law & Econ.* 1 (1996). The theory is especially plausible in the circumstances of the present case. (That doesn't mean it's correct; that's not the issue.) Drug wholesalers appear to be an endangered commercial species. Before the chargeback system was adopted, the manufacturers would often sell directly to hospitals, HMOs, and other favored customers, bypassing the wholesalers, since by selling directly they could monitor each customer's purchases and so try to identify instances in which a customer was purchasing for purposes of arbitrage rather than for its own use. The pharmacies were trying to get into the act by forming buying groups. Buying groups frequently act as their members' wholesaler, buying directly from the manufacturer and thus cutting out independent wholesalers. Desiring a piece of the action with the favored customers, who were proliferating, the wholesalers agreed to implement a chargeback system that would shore up the manufacturers' system of price discrimination, an integral component of the price-fixing conspiracy. And desiring to discourage buying groups they joined with the manufacturers to hold the line against granting any discounts to such groups and so discourage their formation by reducing the advantages of membership.

The picture that we have just sketched may not be true, but there is enough evidence supporting it to preclude summary judgment; and our main point for the present is merely that the defendants are wrong to argue that it would make no sense for the wholesalers to conspire with them to fix the prices of pharmaceutical drugs.

It would make perfectly good sense, and so the "smoking gun" evidence cannot be dismissed as being obviously misunderstood, empty boasting, or idle corporate gossip.

The wholesalers point to their wafer-thin profit margins. The margins might be even thinner if the wholesalers had refused to play their appointed role as agents of a manufacturers' cartel – in fact they might be out of business. And absence of monopoly profits is not inconsistent with monopoly (collusive or single-firm), since firms may transform monopoly profits into costs in their efforts to engross a larger share of them. The wholesalers point to instances in which they did engage in arbitrage, sought permission to give discounts to pharmacies, and even helped to organize buying groups of pharmacies. This evidence does not erase the factual question of whether the wholesalers joined the conspiracy. It is just evidence to be weighed in the balance by the trier of fact. There are inherent strains in a cartel. A member can do better by undercutting the cartel slightly and obtaining enormously increased volume at a slight sacrifice of unit profit than by honoring the cartel price and suffering an erosion of sales because of cheating by less scrupulous members. George J. Stigler, "A Theory of Oligopoly," in Stigler, *The Organization of Industry* 39 (1968). That is why cartels tend to collapse of their own weight. And if as the plaintiffs argue the wholesalers were tools of the manufacturers – reluctant accomplices, yet not the less liable for that, *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n. 6 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 (1960); *MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc.*, 62 F.3d 967, 973 (7th Cir. 1995); *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1163 (7th Cir. 1987), rather

than principals – naturally they would be restive. As for the wholesalers' sponsorship of buying groups, it did not begin until after this litigation commenced, and may be strategic. And no significance can be attached to the fact that some of the wholesalers sued the manufacturers. *Illinois Brick* entitles them to do so. One virtue of the rule of that case is that it creates an incentive for middlemen to break out of a cartel and sue the supplier members; it sows dishonor among thieves; they still may *be* thieves.

The last issue is whether the district judge was right to carve DuPont Merck out of the manufacturers' conspiracy. A joint venture of DuPont and Merck, DuPont Merck was formed in 1991, two years after the beginning of the alleged conspiracy (or at least the earliest date within the statute of limitations), to take over DuPont's pharmaceuticals division, DuPont Pharma. Upon its formation, DuPont Merck announced that it was adopting a "single price" policy for DuPont Pharma's drugs, the drugs involved in this suit; it was withdrawing its discounts to hospitals and other favored customers and so abandoning its participation in the chargeback system. This *démarche* may seem irrelevant to whether DuPont Merck should be dismissed from the case. It is conceded to be the successor to DuPont Pharma, so that if DuPont Pharma was violating the Sherman Act between 1989 and 1991, DuPont Merck is liable under standard principles of successor liability even if it cleaned up its predecessor's act upon taking over. *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1424-25 (7th Cir. 1993). Moreover, the adoption of a single-price policy by terminating discounts is not the termination of the antitrust violation. The violation is not the discrimination. The discrimination is

merely evidence of the violation. A cartel so powerful that it did not have to grant discounts to any customer would not be exonerated from antitrust liability. All that the withdrawal of discounts would do in such a case would be to create an additional class of plaintiffs.

The significance of the single-price policy lies elsewhere – in DuPont Merck's extraordinary but not improper argument that it thumbed its nose at the manufacturers' cartel because it had sufficient monopoly power on its own to obtain higher profits by a unilateral pricing policy, namely that of giving no discounts to anyone. The proprietary drugs at issue in this case that DuPont Merck makes are only five in number and they include the famous anticoagulant Coumaden, which although its patent has expired is said to have no competition because doctors refuse to prescribe a generic or other substitute. The other four drugs are sufficiently comparable to Coumaden in point of uniqueness, according to DuPont Merck's submission, that it can make more money selling them all without any discounts even though it must lose some sales to the formerly favored customers.

This is not an absurd argument; it may for all we know be entirely sound; it is backed by evidence. But there is enough contrary evidence to preclude summary judgment. Before 1991, but within the period of the statute of limitations, DuPont Pharma had a two-price policy and a chargeback system to implement it, and it participated in the trade association meetings in which, if the plaintiffs' "smoking gun" evidence is credited – as it must be, in the present posture of the case – the conspiracy was hatched or nurtured. The withdrawal of the

discounts is evidence that DuPont Merck believed that it had enough unilateral monopoly power to go its own way. But it is not conclusive evidence, and even if it were, it would be consistent with DuPont Pharma's not having shared the belief. We said that DuPont Merck is liable for its predecessor's antitrust violations and here we add that if DuPont Pharma is found to have participated in the conspiracy, DuPont Merck could not avoid liability even for the post-1991 conduct of the conspiracy, a conspiracy in which it was not (or so a jury might find) involved. A mere change of policy, a mere cessation of involvement, is not effective withdrawal from a conspiracy. To terminate one's liability for the continuing illegal acts of a conspiracy that one had joined, a withdrawing member must either report the conspiracy to the authorities or announce his withdrawal to his coconspirators. *United States v. United States Gypsum Co.*, 438 U.S. 422. 463-65 (1978); *United States v. Patel*, 879 F.2d 292, 294 (7th Cir. 1989); *United States v. Puma*, 937 F.2d 151, 158 (5th Cir. 1991). So far as appears, DuPont Merck did neither.

The four rulings appealed from are thus

REVERSED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
BRAND NAME PRESCRIPTION	)	94 C 897
DRUGS ANTITRUST LITIGATION	)	
	)	MDL 997
This Document Relates to:	)	
	)	
ALL CASES	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on numerous motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons that follow, the Manufacturer Defendants' motions are denied. The Wholesaler Defendants' motions are granted.

BACKGROUND

Tens of thousands of retail pharmacies, ranging in size from individual, small pharmacies to large, multi-state chains, comprise the plaintiffs of the various actions consolidated[1] before us. Virtually all of the leading

[1] Hundreds of cases involving thousands of retail pharmacy plaintiffs alleging industry-wide antitrust violations have been filed throughout the country. Approximately two years ago, these actions were transferred to this Court by the Judicial Panel on Multidistrict Litigation for coordinated or consolidated pretrial proceedings.

manufacturers and wholesalers of brand name prescription drugs are the defendants in this multi-district antitrust litigation. The plaintiffs have polarized into two identifiable groups. On behalf of a nation-wide class[2], the "Class Plaintiffs" allege a price-fixing conspiracy, in which the defendants agreed to eliminate price competition and to keep prices of "Prescription Brand Name Drugs"[3] artificially high to retail pharmacies in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The other group of plaintiffs consists of thousands of independent pharmacies, drug store chains and grocery store chains who have chosen to opt out of the class and pursue their own individual claims. In addition to alleging Sherman Act conspiracy violations, these opt out plaintiffs, known collectively as the "Individual Plaintiffs", assert price discrimination claims pursuant to the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (d) and (f).[4]

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[2] The plaintiff class is defined as follows:

All persons and entities in the United States who, at any time during the period from October 15, 1989, to the present, purchase or purchased prescription brand name drugs directly from any of the defendants. The class excludes defendants; other manufacturers of prescription brand name drugs; other wholesalers of prescription brand name drugs; co-conspirators of any of the foregoing entities; affiliates, parents, and subsidiaries of any of the foregoing entities; governmental entities; mail order pharmacies; health maintenance organizations; hospitals; clinics; and nursing homes.

[3] As defined in ¶ 3(h) of the Consolidated and Amended Class Action Complaint, "Prescription Brand Name Drugs" are "drugs that are sold under the brand name of the Manufacturer rather than the drug's generic name."

[4] The Individual Plaintiffs' Robinson-Patman Act claims are not subject to this motion.

The gravamen of both groups of plaintiffs' Sherman Act claims is that the defendants have collusively created and maintained a dual pricing system that raises or stabilizes the prices paid for brand name prescription drugs by retail pharmacies. To accomplish this goal, the defendants have, inter alia, refused to make available to community pharmacies various discounts, rebates, and other price-lowering mechanisms that each of the Manufacturer Defendants has made available to "institutional" or "managed care"[5] buyers.

Plaintiffs' antitrust allegations arise out of series of agreements and understandings which, plaintiffs contend, established a cartel involving both pharmaceutical drug manufacturers and drug wholesalers, including the 24 Manufacturer Defendants[6] and the 7 Wholesaler Defendants named in this litigation. The purpose of the

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[5] Managed care is a term that refers to Health Maintenance Organizations ("HMOs"), health insurers or managers of employer health plans.

[6] As a result of a settlement agreement which we preliminarily approved on February 15, 1996 the Class Plaintiffs' action has been stayed as to the following settling Manufacturer Defendants: Abbott Laboratories ("Abbott"); American Cyanamid Company ("Cyanamid"); American Home Products Corporation ("AHP"); Bristol-Myers Squibb Company ("BMS"); Burroughs Wellcome Co. ("BW Co.")(now merged into Glaxo Wellcome Inc.); Ciba Geigy Corporation ("Ciba"); Eli Lilly and Company ("Lilly"); Glaxo Inc. ("Glaxo") (now merged into Glaxo Wellcome Inc.); Knoll Pharmaceutical Company ("Knoll"); Merck & Co., Inc. ("Merck"); Pfizer Inc. ("Pfizer"); Schering-Plough Corporation (and Schering Corporation)("Schering"); SmithKline Beecham Corporation ("SB"), Warner-Lambert Company ("W-L Co.") and Zeneca Inc. ("Zeneca").

alleged cartel was to keep the prices at which brand name prescription drugs were sold to retail pharmacies at artificially high levels. Although it is not clear exactly when this cartel was allegedly formed, the plaintiffs claim that the agreements and understandings at issue date back at least as far as the early 1980s.

The emergence of the cartel was allegedly premised upon certain changes in the health care environment and marketplace in the 1970s. According to the plaintiffs, in the early part of that decade, certain of the Manufacturer Defendants responded to pressure from for-profit hospitals and other traditional health care institutions for discounts off of the published wholesale price of drugs.[7] The defendants' discounting practices allegedly began to proliferate in the 1970s with the advent of non-traditional managed care organizations and other re-sellers of drugs, such as mail order houses. According to the plaintiffs, despite their efforts to negotiate with the defendants, retail pharmacies, both chain and independent alike, have been denied similar discounts afforded to managed care entities and mail order houses – the so-called "favored purchasers." Allegedly, as a matter of policy, the Manufacturer Defendants even refuse to discuss the issue of discounts to retail pharmacies.

Based primarily on the Manufacturer Defendants' refusal to discount to the retail sector of the industry, the plaintiffs allege widespread Sherman Act violations,

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[7] The "discounts" in issue in this litigation are discounts off of the published wholesale price of the drug involved. Other discounting practices in the industry, such as discounts for cash or prompt payment, are not implicated in this case.

arguing that the Manufacturer Defendants and the Wholesaler Defendants, by foreclosing the plaintiffs' access to discounts offered to favored purchasers, entered into a unitary conspiracy to keep the prices paid by retail pharmacies artificially high. The participation of the Wholesaler Defendants in the alleged conspiracy is premised upon the wholesalers' purported agreement to set up an industry-wide system to facilitate the structure of differential pricing necessary to prevent discounting to retail pharmacies. According to the plaintiffs, this system – known as the "chargeback system" – was developed and maintained for the explicit purpose of preventing the retail pharmacies from obtaining discounts, and for preventing "arbitrage" or "diversion"[8].

Under the chargeback system, a discounted contract price is negotiated by the manufacturer and the favored purchaser. If the "discounted" prescription drugs are supplied out of a wholesaler's inventory, the wholesaler delivers the product to the favored purchaser at the discounted price and then "charges back" the manufacturer for the difference between the price paid by the wholesaler and the lower price at which it was delivered. According to the plaintiffs, this chargeback system is integral to the success of the alleged conspiracy. The plaintiffs further maintain that the Wholesaler Defendants encouraged a two-tier pricing system, under which

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[8] "Arbitrage" refers to the simultaneous purchase in one market and sale in another of a security or commodity in hope of making a profit on price differences in the different markets. "Diversion" refers to the turning aside or alteration of a natural course or route.

the retail pharmacy plaintiffs paid artificially high prices for brand name drugs.

The Manufacturer and Wholesaler Defendants dispute at length the plaintiffs' allegations, arguing that there exists no evidence of collusive or parallel conduct. In support, the Manufacturer Defendants assert that each manufacturer's discounting and pricing decisions were independently made and that the manufacturers' individual responses to both the managed care entities and the retail pharmacies' respective requests for discounts have not been uniform.

The Manufacturer Defendants further argue that to the extent that the retail pharmacy plaintiffs are denied discounts afforded to managed care and other institutional buyers, there is an economically sound reason for the disparity. In support, the defendants cite to the power of these groups to affect market share. According to the defendants, most managed care organizations have created "formularies," i.e., restrictive lists of drugs under which their physicians are directed to prescribe. The defendants argue that managed care organizations use formularies and the ability to control access to patient populations to negotiate discounts or rebates from pharmaceutical manufacturers. *See* Defendants' Joint 12(m) at ¶ 25, 37. Essentially, it is the Manufacturer Defendants' position that, by threatening to exclude the manufacturer's products from their respective formularies unless the manufacturer agrees to a discount or rebate, managed care organizations possess the market power to negotiate discounts from a drug manufacturer. The defendants further argue that, unlike managed care, retail pharmacies simply do not possess the same market power, or the

same power over the prescribing decision, which managed care possesses.

With respect to the plaintiffs' claims against the wholesalers, the Wholesaler Defendants contend that their participation, as alleged by the plaintiffs, is completely implausible. According to the wholesalers, not only has their conduct been innocent, but at times it has been wholly antithetical to the alleged conspiracy. Even if there existed a *manufacturer* conspiracy to deny discounts to the plaintiffs, the wholesalers maintain that their participation was completely unnecessary.

The plaintiffs contest the defendants' positions in their entirety. The plaintiffs not only take issue with the degree of market power that the Manufacturer Defendants ascribe to managed care organizations, the plaintiffs also dispute the Manufacturers' claims that retail pharmacies cannot affect market share.

Presently before us are numerous summary judgment motions – twenty-six in all – attacking all plaintiffs' Sherman Act claims. First, each of the 24 named Manufacturer Defendants[9] moves individually for summary judgment in its favor based on the plaintiffs' failure to meet its burden of proof. Next, the 7 Wholesaler Defendants collectively move for summary judgment. Finally, the Manufacturer Defendants collectively move for judgment in their favor on the plaintiffs' indirect purchaser claims.

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[9] Due to the pending settlement agreement, Class Plaintiffs' filings pertain only to the non-settling Manufacturer Defendants. The Individual Plaintiffs, who are not party to any settlement agreement, address the Sherman Act summary judgment motions of all of the Manufacturer Defendants.

Each of these motions will be addressed below. Before proceeding, however, we first examine the legal principles from which to judge a motion for summary judgment.

LEGAL STANDARD

Summary judgment is appropriate if the pleadings, answers to interrogatories, admissions, affidavits and other materials show "that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R.Civ. P. 56(b). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment carries the initial burden of showing that no such issue of material fact exists. Pursuant to Rule 56(b), when a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue as to any material fact and that the moving party is not entitled to judgment as a matter of law. *Anderson*, 477 U.S. at 250.

Although the general rule is that all reasonable inferences are drawn in favor of the non-moving party, antitrust law limits the extent to which permissible inferences from ambiguous evidence may be drawn in a Section 1 Sherman Act case. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *Wigod v. Chicago Mercantile Exchange*, 981 F.2d 1510, 1514 (7th Cir. 1992); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987).

Specifically, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588 (*citing Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)). This, however, does not mean that a defendant in an antitrust case may prevail on summary judgment simply by enunciating any economic theory supporting its behavior. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 468 (1992). Rather, it simply means that the range of permissible inferences is limited when a plaintiff asks a court to infer a price-fixing conspiracy from normal business activity that, standing alone, is consistent with lawful competition.

The United States Supreme Court has cautioned that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting*, 368 U.S. 464, 473 (1962). The Supreme Court's warning, however, does not mandate the trial of cases where the cause of action alleged is substantively deficient. Rather, as the Seventh Circuit notes "despite its sweeping language, *Poller* and its progeny simply stand for the proposition that, if a claim under the antitrust laws has been adequately set forth . . . , the highly factual and subjective questions of intent and purpose should be resolved after discovery and trial." *National Org. for Women v. Scheidler*, 968 F.2d 612, 617 (7th Cir. 1992), *rev'd on other grounds* 114 S.Ct. 798 (1994) (citations and quotation marks omitted). Where the record is clear that the antitrust claims cannot

succeed, then judicial administration is better served by disposition prior to trial. *Wigod v. Chicago Mercantile Exchange*, 981 F.2d 1510 (7th Cir. 1992) (*citing Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 475 (7th Cir. 1988), *cert. denied*, 488 U.S. 852 (1988), and *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979)).

As applied to a Section 1 Sherman Act claim, the summary judgment standard has, over the years, evolved and has taken on certain subtleties. To establish a Sherman Act violation, the plaintiffs must "present direct or circumstantial evidence that reasonably tends to prove that the defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984) (citations and internal quotation marks omitted).

Where a plaintiff relies on circumstantial evidence, the plaintiff "must show that the inference of conspiracy is reasonable in light of the competing inference[ ] of independent action." *Matsushita*, 475 U.S. at 588. The Seventh Circuit sets forth the approach for evaluating the legal sufficiency of the evidence in an antitrust conspiracy case as follows:

> We first review the evidence of conspiracy submitted by the plaintiff. Next, we examine whether the defendants have offered evidence that tends to show that the conduct which forms the basis of the plaintiff's complaint is as compatible with the legitimate business activities of the plaintiff as it is with illegal conspiracy. Finally, if we determine that this analysis leaves

> the evidence of conspiracy ambiguous, we determine whether the plaintiff can point to any evidence that tends to exclude the possibility that the defendants were pursuing their legitimate independent interests.

Serfecz v. Jewel Food Stores, 67 F.3d 591, 599 (7th Cir. 1995) (*citing Market Force, Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167 (7th Cir. 1990)), *cert. denied*, ___ S.Ct. ___, 1996 WL 89245 (U.S. March 4, 1996).

With these principles in mind, we turn to the motions before us.

DISCUSSION

I. The Legal Sufficiency of Plaintiffs' Evidence of an Overall Antitrust Conspiracy

The plaintiffs allege a "unitary" conspiracy among the Manufacturer Defendants and the Wholesaler Defendants, entered into for the purpose of fixing, raising, maintaining, and stabilizing the prices of prescription brand name drugs in violation of Section 1 of the Sherman Act. Central to the accomplishment of the objective of the alleged conspiracy was the establishment of an industry-wide system to facilitate a structure of differential pricing. Under this structure, the retail pharmacy plaintiffs were placed in a class of trade with which the Manufacturer Defendants would not, usually as a matter of policy, entertain or negotiate requests for discounts off of the published wholesale prices of the brand name drugs involved. According to the plaintiffs, the purpose and effect of the conspiracy was to eliminate price competition and to keep prices of brand name prescription

drugs artificially high to retail pharmacies in violation of Section 1 of the Sherman Act.

Section 1 of the Sherman Act prohibits the formation of any "contract, combination . . . or conspiracy in restraint of trade or commerce . . . . " 15 U.S.C. § 1. A civil plaintiff seeking recovery under Section 1 must allege and ultimately prove: "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury." *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993) (citations omitted). It is clear from all of the parties' submission that the first element – the element of concerted action – is the main element in dispute here.

What constitutes independent rather than collective behavior for purposes of the antitrust laws and what kind of evidence may be used to prove concerted action is addressed by the Sherman Act itself, as well as the federal cases interpreting the Act. Not surprisingly, direct evidence of an agreement to engage in anti-competitive conduct is not necessary to establish liability under the Sherman Act. *Contractor Utility Sales Co. v. Certain-Teed Products Corp.*, 638 F.2d 1061, 1074 (7th Cir. 1981). This is so because, by its nature, a conspiracy is rarely susceptible to direct proof. Rather, proof of concerted action is most often "a matter of inference, apprehended and proven circumstantially." *Trist v. Federal Savings & Loan Ass'n*, 466 F.Supp. 578, 590 (E.D.Pa. 1979) (citations omitted). As the Supreme Court has explained, concerted action or a "unity of purpose" may be inferred from a course of dealing or from other circumstantial evidence:

> No formal agreement is necessary to constitute an unlawful conspiracy . . . . The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words. Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified.

American Tobacco Co. v. United States, 328 U.S. 781, 809-10 (1946) (citations omitted).

Both the Class Plaintiffs and the Individual Plaintiffs claim that they have direct and circumstantial evidence of the alleged conspiracy. The Class Plaintiffs even boldly assert that their "direct" evidence, standing alone, would be sufficient to warrant a denial of the defendants' summary judgment motion.

The "direct" evidence to which both plaintiffs refer consists primarily of incriminating statements and observations made by various defendants and other members of the industry. It includes evidence that competing manufacturers and competing wholesalers held meetings, discussed pricing issues, and engaged in a pervasive exchange of trade and pricing information. While this evidence tends to show that various defendants engaged in collusive, anti-competitive conduct, it is not "direct" evidence of an agreement. Thus, although there is "direct" evidence that various defendants engaged in conduct consistent with the plaintiffs' theory of the existence of a pricing cartel, there is no significant "direct"

evidence of an exchange of commitment as alleged in the plaintiffs' complaints.

That is not to say, however, that the plaintiffs' failure to come forward with significant direct evidence of a conspiracy is fatal to their case. On the contrary, as the discussion that follows demonstrates, the plaintiffs have come forward with ample circumstantial evidence to raise a reasonable inference that the Manufacturer Defendants engaged in collusive, anti-competitive conduct.

A. Plaintiffs' evidence of conspiracy against the Manufacturer Defendants

In support of their allegations that the Manufacturer Defendants entered into an agreement to maintain prices to the retail segment of the industry at artificially high levels, the plaintiffs point to the following: (1) parallel conduct among the Manufacturer Defendants; (2) interdependence between and among the defendants; (3) the existence of industry wide resale price maintenance – i.e. the creation and maintenance of the chargeback system;[10] and (4) frequent, formal communications among competitors – i.e. an opportunity to conspire.

First, the plaintiffs argue that the defendants have engaged in parallel, anti-competitive conduct which was manifested in the form of industry wide price discrimination and a coordinated refusal to discount to retail pharmacies. A central element of the plaintiffs' position is that the defendants engaged in a two-tiered pricing system,

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[10] For a detailed discussion on industry-wide resale price maintenance, a.k.a., the charge-back system, *see infra* at p. 51.

pursuant to which the retail segment was forced to pay artificially high prices. That the defendants did engage in a tiered pricing system is virtually undeniable. Indeed, David Landsidle ("Landsidle"), a representative of Defendant Abbott, described the existence of the tiered system and the manufacturers' general approval of it. Regarding his participation in a series of Pharmaceutical Manufacturers Association ("PMA") meetings concerning tiered or differential pricing, Landsidle testified as follows:

> Q: What were the points of views that were expressed?
>
> A: People would express the point of view that, historically, the industry has offered different prices to different classes of customers, we could do so. The marketplace operated best if we did so, and that should be done. Some people said, however, politically we're getting beat up on this issue. We should do away with this practice and go to a single pricing policy. So, kind of two sides of the issue.
>
> Q: What was the prevailing view?
>
> A: *The prevailing view was that the current practice of having different prices was the appropriate practice.*

Landsidle Dep. at 47-48 (emphasis added).

Defendants respond by arguing that a "glaring" absence of parallel behavior exists in their pricing practices. In contrast to the plaintiffs' assertions, the defendants state that manufacturers' list prices were not

parallel and were in fact set competitively. As the defendants note, one of the Class Plaintiffs' experts even acknowledged that he found no conspiracy to fix list prices. See Lucas Deposition Transcript at 224 (Oct. 30, 1995). The defendants further argue that their discounts to managed care were not parallel, as their discounting practices varied in time and degree. According to the Manufacturer Defendants, some defendants began discounting in the 1980s; others started in the 1990s; and the size of the manufacturer discounts varied widely by product and consumer. Accordingly, it is the defendants' position that their pricing practices have been competitive.

However, conduct need not be point-for-point consistent to be deemed parallel.[11] The plaintiffs are not alleging that all competition among the Manufacturer Defendants ceased. Rather, the anti-competitive conduct in which the defendants allegedly engaged was the uniform decision not to discount to an entire segment of the retail industry, i.e., an agreement not to undercut each other by giving discounts to retail pharmacies and retail buying groups. The plaintiffs' concession that discounting to managed care began at varying times and occurred in varying degrees does not undermine their theory.

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[11] Of course, parallel conduct standing alone is not enough to prove a conspiracy. *Reserve Supply Co. v. Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 50-51 (7th Cir. 1992). Rather, proof of a conspiracy requires parallel behavior plus additional facts or circumstances that raise the inference of agreement. *Id.*; *Market Force*, 906 F.2d at 1170.

Central to the plaintiffs' claims is the Manufacturer Defendants' allegedly collective agreement not to bid to community pharmacies – chains and buying groups alike – seeking to participate in discounting programs already offered to managed care. According to the plaintiffs, the early 1980s saw the advent of substantial discounting by pharmaceutical manufacturers to managed care entities. As these pricing practices began to proliferate and to affect the marketplace, retail pharmacies, both individually and in the form of buying groups, began to request similar discounts. These requests were met with uniform denials by the manufacturers.

As demonstrated in the plaintiffs' respective briefs, in almost every instance, each Manufacturer Defendant responded that its company policy was not to give discounts to retail pharmacies, retail buying groups, or the retail "class of trade."[12] For instance, on May 15, 1986, after receiving a request for bid pricing from the Pharmacy Buying Association ("PBA"), a retail buying group, Glaxo sent a letter to the PBA stating: "Currently our policy at Glaxo is not to bid to retail pharmacies or retail pharmacy buying groups." Independent Plaintiffs' Ex. 16. On May 16, 1986, William H. Rorer, Inc. (later to become

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[12] *See* Class Plaintiffs' Response to the Motion of the Wholesaler Defendants for Summary Judgment and to the Legal Principles and General Background Facts Submitted by the Manufacturer Defendants (hereinafter "Class Plaintiffs' Consolidated Response"), at 45 n.29; and Individual Plaintiffs' Memorandum in Opposition to Manufacturer Defendants' Consolidated and Individual Motions for Summary Judgment (hereinafter "Individual Plaintiffs' Consolidated Response"), at 40.

part of Defendant Rhone-Poulenc Rorer) sent a letter to the same buying group stating: "At the present time, William H. Rorer, Inc. does not participate in bids for independent pharmacies." Independent Plaintiffs' Ex. 2-E. Similar letters followed from Defendant Ciba-Geigy on May 21, 1986, Defendant Bristol-Myers on May 22, 1986 and others. *See* Independent Plaintiffs' Ex. 2-C, and 2-D.

The uniformity of the Manufacturer Defendants' refusal to deal with retail pharmacies as a class is striking. That the defendants' general refusal to even discuss discounting with retail pharmacies was the result of collusion moreover finds circumstantial support in the record. Both the Class Plaintiffs and the Independent Plaintiffs come forward with certain statements and observations made by members of the industry which cast in a suspicious light the defendants' conduct. By way of example, we set forth some of the plaintiffs' evidence.

Julius Sarnat, a former executive with wholesaler General Drug Company, testified at his deposition that there were discussions and a "general agreement" among the Manufacturers on the subject of selling to retail buying groups:

> Q: You recall involving the drug manufacturers in regard to their policy on dealing with buying groups?
>
> A: Well, we posed the question of what their attitude was in terms of making sales to these groups and acknowledging them as a source of supply. And if so, what their agenda would be in relation to the acquisition of their products.

> Q: And what information did you receive from them in that regard?
>
> A: Well, we found that mostly – *they were all in general agreement that they would not entertain selling brand name pharmaceuticals to any of these buying groups.*

Sarnat Dep. at 89-90 (emphasis added).[13]

A series of documents involving Ciba-Geigy offers perhaps even more compelling evidence that the defendants' frequent denials of retail pharmacists' requests for discounts were the result of concerted actions. On September 4, 1985, a Ciba-Geigy memorandum noted the growth of retail pharmacy buying groups and their increasing requests for bids from drug manufacturers and stated:

> It would be hoped that all drug companies would reject these offers. However, knowing the bidding policy of several companies, I doubt that the PMA will put forth a united front.

Class Plaintiffs' Tab 207, at 2). In response to this memorandum, one of the recipients the next day suggested that steps be taken to assure that drug companies were "united" as to the issue:

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[13] Manufacturer Defendants argue that Sarnat's testimony is not direct evidence of a conspiracy not to offer discounts to retailers, for Sarnat is not talking about discounting to retail pharmacies but rather, about manufacturers' selling directly to retail pharmacies. The defendants further attack the foundation of Sarnat's observation, pointing out that when asked, Sarnat could not remember exactly with whom he spoke.

> The attached information[14] is self-explanatory, and I pass it on to you for two reasons. First, for your information: secondly and more importantly, to ask if there is anything we are doing or can do about this potentially dangerous situation. *Is the PMA taking steps to assure that companies are united on this issue, and can we put pressure on them toward this end?*

Class Plaintiffs' Tab 207 at 1. The author of this memorandum concludes: "It would be hoped that all drug companies would reject these offers." *Id.* The Manufacturer Defendants attempt to minimize the significance of this exchange, stating that the memoranda were never acted upon and further claiming that upon concluding that these communications were improper, the second memorandum was "tossed in the garbage." Nevertheless, this does not detract from the fact that such communications were made and does not address the basis for the author's assumptions that the PMA could and would put on a "united" front.

Finally, the minutes of a November 1990 National Pharmaceutical Council ("NPC") meeting[15] reflect a discussion of "therapeutic substitution" and "referred

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[14] The "attached information" consisted of two letters sent to pharmacists in Mississippi and Kansas seeking participation in retail buying groups formed to obtain contract pricing from manufacturers.

[15] In attendance at this meeting were representatives from many named defendants, including: Eli Lilly, Abbott, Pfizer, Glaxo, SmithKline, Searle, Marion Merrell Dow, Johnson & Johnson, Zeneca, Warner Lambert, Rhone-Poulenc Rorer, Bristol Myers Squibb, Boehringer Ingelheim and Upjohn. *See* Independent Plaintiffs' Landgraf Ex. 15 at NPC00849.

product list[s]." The notion that manufacturers would even enter into discussions with buyers concerning therapeutic substitution is moreover referred to as a "disturbing trend." Independent Plaintiffs' Landgraf Exhibit 15 at NPC00849.

While these representative statements alone do not prove the existence of an agreement violative of the Sherman Act, taken together, they buttress the plaintiffs' argument that the defendants' seemingly uniform refusal to deal with retail pharmacies was the result of conscious behavior or collusion.

The plaintiffs next claim that it was in the Manufacturer Defendants' interest to engage in the alleged parallel conduct. While the Individual Plaintiffs discuss this issue in terms of "interdependence," the Class discusses it in terms of "motive." Nomenclature aside, establishing that the defendants had something to gain by consciously engaging in apparently anti-competitive parallel conduct is a critical component to the plaintiffs' conspiracy claim. To use the Individual Plaintiffs' choice of words, this entails a showing that the conduct claimed to be parallel would be in each conspirator's interest only if all conspirators acted alike. It would be against each conspirator's interest if a conspirator acted alone. *See Reserve Supply*, 971 F.2d at 50-51 & n.10.

According to the plaintiffs, the motive for the Manufacturer Defendants' refusal to discount to the retail segment is clear: to prevent the spread of the price competition that they were experiencing in the managed care segment of the industry. As the Individual Plaintiffs

describe the situation, the spread of discounts to community pharmacies would have "significantly eroded the manufacturers' bloated profit margins." *See* Individual Plaintiffs' Ex 1., Matox at CG00951178 ("we [will] raise prices in the retail fee – for service to balance our low profit return from the HMO sector"); Individual Plaintiffs' Ex. 27 at GL00911453 (pricing brochure notes that "the traditional retail class of trade" has been "subsidiz[ing]" discounts to favored buyers).

As plaintiffs' counsel articulated during oral argument, back in the 1970s or 1980s, one manufacturer committed the "original sin" by succumbing to the pressures to discount to managed care. Now, faced with similar pressures by the retail segment, none of the manufacturers want to repeat that "sin" by succumbing to the discount requests of the retail pharmacies. Through a series of meetings, a continuous interchange of information, and an ultimate interchange of commitment, the defendants formed a cartel to prevent their discounting from spreading to the retail segment and to make sure that nobody strayed from this course. An internal memorandum from Defendant Abbott's files buttresses the plaintiffs' theory, summarizing the situation as follows:

> It seems to me that the PMA is kind of an OPEC in this context[16] – the first country that breaks away from the cartel will reap the maximum advantage (hence the long-term instability of any cartel). Specifically, if we are perceived by

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[16] The context to which the author of the memorandum refers is the issue of what would happen if discounting were to spread to mail order companies like Medco.

> Medco as an ally, then we might reach sweetheart understandings which would be of competitive advantage to us. Of course we do not want to be perceived by our brethren on the PMA as black sheep.

Class Plaintiffs' Tab 312 at 1: Tab 313 at 290-96: 373-376.[17] Such evidence supports the plaintiffs' notions of manufacturer interdependence.

Finally, that the defendants had the opportunity to conspire is unquestionable. The record is replete with evidence of seminars and trade association meetings which virtually every defendant attended at one time or another and a coordinated exchange of pricing and other competitive information shared among the manufacturers. Furthermore, the defendants' mutual awareness of each others' policies is demonstrated by the defendants' prolific use of data services, exchanges, and in their united use and development of the chargeback system discussed below.

The plaintiffs cite to numerous instances where the PMA was used by the Manufacturer Defendants as a "clearinghouse for the exchange of pricing and other competitively sensitive information." According to the plaintiffs, PMA meetings, attended by the manufacturers, provided incomparable opportunities for collaboration on competitive issues. Communications were made on such issues as advance manufacturer notification of price increases, pricing options for manufacturers, and the

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[17] The Manufacturer Defendants respond to this document by arguing that the context involved a relationship between an advertising agency and Medco. *See* Pien Dep. at 289-96, 370-71.

administration of the chargeback system. Regarding this last subject, a memorandum dated March 29, 1990 discusses American Cyanamid's contacting of several other pharmaceutical manufacturers to determine their practices regarding "upfront" deposit/credits to wholesalers. The memorandum concludes: "George, there are still a couple of companies I could not get on the phone in this quick review, but it does appear that *the industry is holding comparatively firm* and not giving up from deposits . . . . " Fritzky Ex. 5 (emphasis added) at AC001946. The plaintiffs cite this memorandum and others as evidence of industry-wide collusion and anti-competitive conduct.

The plaintiffs cite to additional occasions on which large numbers of manufacturers gathered to discuss common concerns within the industry. These discussions frequently were held under the auspices of other industry organizations or conferences. Beginning in 1991, for example, the International Business Communications/ U.S.A. Conferences, Inc. ("IBC"), started conducting seminars on pharmaceutical pricing. Representatives of virtually every major pharmaceutical manufacturer were in attendance to view sessions on such topics as "Price Discounting to Major Purchasers," "Pharmaceutical Pricing Forces, Trends & Strategies," and "Managed Care and the Pharmaceutical Industry: What Constitutes a Win-win Relationship." Each of the seminars purportedly entailed group discussions on issues and concerns related to pharmaceutical pricing. Indeed, the record is replete with evidence of similar meetings attended by virtually every manufacturer. Sensitive information was frequently on the agenda at these meetings, thereby providing a forum

for such information to undergo a coordinated, industry wide exchange. At the very least, both groups of plaintiffs have come forward with evidence that the defendants engaged in frequent communications with one another and that they had a general mutual awareness of each other's policies.

In responding to the plaintiffs' evidence, the Manufacturer Defendants effectively fragment and compartmentalize each piece of the plaintiffs' evidence of conspiracy, and ask us to look at each piece of evidence in isolation apart from the other parts of the record. The United States Supreme Court, however, has expressly admonished against such an approach:

> In [conspiracy anti-trust cases] plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. ". . . The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States v. Patten*, 226 U.S. 525, 544 (1913) . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it."

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690. 698-99 (1962) (quoting *American Tobacco Co. v. United States*, 147 F.2d 93, 106 (6th Cir. 1946)). It is the defendants' argument that parallel conduct alone does not amount to a conspiracy; isolated statements and observations of industry members do not alone prove a conspiracy; meetings and communications between and among the defendants are innocent activity and do not in

and of themselves prove a conspiracy; and systematic exchanges of competitive information and trade data do not amount to a conspiracy. While each piece of the plaintiffs' evidence, when looked at in isolation, would not be sufficient to establish a conspiracy, when the evidence is looked at as a whole and in the context of the plaintiffs' theory of its case, we believe that the evidence is sufficient to raise a reasonable inference of the existence of a conspiracy among all of the Manufacturer Defendants.

B. Whether the Manufacturer Defendants have offered evidence tending to show that their conduct is as compatible with legitimate business activities as it is with illegal conspiracy.

We now turn to whether the Manufacturer Defendants have presented a plausible, justifiable reason for their conduct that is consistent with proper business practice. It is at this point where the motivation of the defendants becomes critical. Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: "if the [defendants] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Matsushita*, 475 U.S. at 596-97.[18]

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[18] The Supreme Court cautions, however, that if defendants did have a plausible reason to conspire, ambiguous conduct alone does not suffice to create a triable issue of conspiracy. *Id.* Rather, conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more,

Indeed, the defendants maintain that their conduct cannot give rise to any such conspiratorial inference, and they set forth several contentions to that effect. The defendants first affirmatively contend that their pricing behavior was not "parallel" and argue that the absence of such parallel conduct alone mandates summary judgment in defendants' favor. *See, e.g., Quality Auto Body, Inc. v. Allstate Ins. Co.*, 660 F.2d 1195, 1200 (7th Cir. 1981) (affirming summary judgment where conduct of insurers alleged to have engaged in conspiracy was not parallel), *cert. denied*, 455 U.S. 1020 (1982). In an effort to refute the presence of parallel conduct, the defendants stress that industry pricing policies vary considerably depending on the manufacturer, the drug, the dosage, and the competitive circumstances involved. The policies of manufacturer discounting to managed care may have been uniform among these defendants, but such policies were implemented at different times and to different degrees. Furthermore, although the plaintiffs allege that the manufacturers uniformly decline to give discounts to retailers, the defendants profess that several manufacturers, in the exercise of their individual business judgments, have offered discounts or rebates on particular products to retailers or retailer buying groups.

The defendants argue that, even if we were to construe as parallel conduct the manufacturers' uniform discounting to managed care and their unvarying refusal to consider the retail pharmacies' ability to similarly influence the market, the plaintiffs still cannot establish that

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support an inference of conspiracy. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984).

each of the manufacturer's pricing decisions was against its economic self-interest. Evidence of parallel conduct which is a "plausible coincidence or an expectable response to a common business" does not support an inference of conspiracy. *Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp.*, No. 93 C 5578, 1995 WL 532265, *27 (N.D.Ill. Sept. 6, 1995) (quoting 6 P. Areeda, Antitrust Law, § 1425 at 146).

The defendants maintain that the various pricing and discounting decisions made by the defendants were based on a variety of legitimate business concerns, including the changing posture of the health care industry and the economic emergence of managed care. The granting of discounts to hospitals and managed care organizations was purportedly justified by the manufacturers' desire to avoid being denied access to participating physicians and patients. The denial of comparable discounts to retail pharmacies was similarly justified given the defendants' belief that the retail pharmacies, which did not utilize restrictive formularies, did not possess the same ability to deny manufacturers access to certain groups. The defendants argue that these circumstances, which were common to all of the manufacturers, add to the "plausible and justifiable alternative interpretation of [each defendant's] conduct that rebuts the alleged conspiracy." *Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1174 (7th Cir. 1990). According to the defendants, discounts were not extended to retail customers because, unlike managed care, the retail customers did not have the power to affect market share.

This contention by the defendants, that the retailers lack the ability to affect market share, is vigorously disputed by the plaintiffs and is pivotal to each party's case. If, as a matter of law, the manufacturers' collective assertions are accurate, then the defendants' no-discounting policies truly reflect a legitimate business concern. However, if the plaintiffs are able to prove an ability to influence the market, then the defendants' uniform denials warrant scrutiny beyond that afforded on summary judgment.

The defendants steadfastly maintain that retailers significantly differ from managed care in their ability to affect market share. Through its use of formularies and its ability to control access to patient populations, managed care successfully exerted economic pressure on the manufacturers in order to negotiate discounts on previously undiscounted drugs. The ability of managed care to exclude the manufacturer's products from their respective formularies absent manufacturer capitulation provided a powerful incentive. The defendants claim that, unlike managed care, the retail pharmacies simply do not possess that same market power, or the same power over the prescribing decision. As such, discounts to the retailers have been largely denied.

In support of their argument that the retailers differ significantly from managed care in this respect, the defendants note that, in sharp contrast to their experiences with managed care, no retailer has noticeably reduced its sales following a manufacturer's refusal to offer a discount. *See* Rodowskas Dep. Tr. at 486. The defendants further maintain that retail pharmacies have little influence over the drug prescribed by the doctor

and cannot switch to alternative products as prices increase. Except in cases where generic substitution is permitted, it is the prescribing doctor, and not the retail pharmacy, that determines the brand of drug to be prescribed. *See* Defendants' Joint 12(m) at ¶ 62.

The defendants set forth several explanations as to why retailers have not effectively implemented their own formularies or engaged in therapeutic switching in an effort to liken themselves to managed care. Reasons cited include the "questionable" ethics of pharmacies attempting to influence physician prescribing habits, pharmacists' believing that they cannot in fact control the doctors, pharmacists' views that drug selections for the general public should not be limited, and beliefs that such changes would be too time-consuming or otherwise impractical. See Defendants' Joint 12(m) at ¶ 66. In any case, the defendants maintain that, by their very nature, retail pharmacies lack the ability to affect market share – at least to the degree necessary to warrant the offering of discounts.

The plaintiffs, of course, vehemently dispute the defendants' assessment, arguing that to the extent that the retail pharmacies have been less successful than the favored buyers in, for example, switching prescriptions, it is due to the higher prices paid as a result of the conspiracy and the corresponding lack of any economic incentive to attempt to switch a higher-priced brand name drug to a lower-priced one. *See* Plaintiffs' 12(m) Response at § 62. This observation notwithstanding, where pharmacist requests to switch prescriptions have been made to physicians, the record indicates that pharmacists have overall been very successful. A nationwide survey cited by the

plaintiffs indicates that 76.9% of physicians asked by a pharmacist to switch prescriptions consented to do so. *See* G. Muirhead, "R.Ph.s Playing Major Role in Therapeutic Decisions," *Drug Topics*, June 7, 1993 at 12-13. Experiments on drug switching conducted in the field further support the accuracy of such results and indicate that, at least when an effort is made to affect market share, the retailer may, contrary to the defendants' contentions, possess considerable power.

The ability of even a single independent pharmacy to move market share and the defendants' unfailing refusal to discount regardless was dramatically demonstrated in an "experiment" by Plaintiff Towler Drug Company. In 1990, Mr. Towler began dispensing Schering's Proventil in preference to Glaxo's Ventolin, two co-marketed products. Glaxo's sales representative noticed the change in sales and wanted to know why Towler was prescribing so much Proventil and so little Ventolin. When Towler explained that he was trying to qualify for a Schering discount, the Glaxo representative told Towler that it was Glaxo's policy not to give any discounts to independent pharmacists but asked him to demonstrate that he could move market share to the Glaxo product. Towler Aff.II ¶ 9. Towler thereafter began dispensing only Glaxo's Ventolin, but Glaxo refused to change its no-discount policy. Towler Aff. ¶ 11.

After three months, Schering's representative visited Towler and wanted to know why Towler was dispensing so much Ventolin when he had previously been dispensing Schering's Proventil. Towler Aff.II ¶¶ 11-12. Towler explained what he was doing and, having demonstrated Towler's ability to influence the market, requested a

Schering discount. Schering's representative and her supervisor informed Towler that Schering did not give discounts to independent pharmacists under any circumstances. Towler Aff.II ¶¶ 13-14. At the urging of Glaxo's representative, Towler again began dispensing only Ventolin. Ultimately, however, the Glaxo representative told Towler that Glaxo still would adhere to its policy; Towler could not have a discount because he was an independent pharmacist. Towler Aff.II ¶ 16.

In an effort to stop Towler's switching of its product, Glaxo said that it was going to insist that one of the nearby doctors, Dr. Bennett, write all of her prescriptions for the brand name Ventolin or else Glaxo would stop giving her free samples. Towler Aff.II ¶ 17. Undaunted, Towler for the next two months called that doctor and obtained her permission to change all prescriptions written for Ventolin to Proventil. Then, to prove his point, from January to March 1992, Towler had all prescriptions written for Proventil switched to Ventolin; and finally, from March 1992 to May 1992, Towler had all Ventolin prescriptions switched to Proventil. Towler Aff.II ¶¶ 18-21. Despite this graphic proof of Towler's ability to affect the market, neither manufacturer was willing to reward Towler's activity with any incentives.

The plaintiffs cite several other instances which indicate not only that the retail pharmacies had the ability to move market share, but that the defendants were cognizant of this fact. Indeed, the defendants acknowledge that the principal way in which the Independent Physician's Association ("IPA")-type HMO moves market share is to create financial incentives for the community pharmacists that dispense prescriptions. *See* Defendants' Joint Brief at

13. Along these lines, a study conducted by Glaxo concluded:

> Regardless of specialty and number of HMO affiliations, physician awareness of formularies is suggested to be low. Physicians who are aware of formularies rarely comply with them. . . . Physicians who are aware of the formulary and report they consult it seldom adhere to the formulary. . . . *Increasingly, it appears that the role of community pharmacists is the focus of cost containment. This is evidenced by the finding that what is prescribed by physicians is often not what is being dispensed at the pharmacy. . . . Not only are pharmacists more likely to be aware of the formulary and the need to adhere to the formulary guidelines, but they are also more likely to question when the prescription is out of line with formulary recommendations and have the prescription changed. . . .*

See Caprariello Ex. 22, at GL03276313, '15 & '19 (emphasis added). American Home Products similarly acknowledged such observations, noting that "In some cases an HMO expects the pharmacist to enforce the formulary, contacting the physician when he writes a non-formulary drug and asking that it be switched. *This can be a very effective mechanism.*" *See* Swartz Ex. 10, at 501285107 (emphasis added).

Such examples exemplify the plaintiffs' contentions that the degree of market power which the defendants ascribe to managed care is often inflated. Furthermore, to the extent that the defendants imply that managed care organizations possess market power to a degree which the retail pharmacies do not, and that this factor accounts for differential pricing, the plaintiffs strongly disagree. In

sum, the plaintiffs have demonstrated that, provided with the proper incentives, the retail pharmacies can and do have some ability to move market share. At the very least, the plaintiffs' evidence as to this point casts a cloud upon the defendants' arguments to the contrary.

Given this latter circumstance, the defendants have failed to establish that the conduct which forms the basis of the plaintiffs' complaint is as compatible with the legitimate business activities of the plaintiff as it is with an illegal conspiracy. Although the defendants maintain that their pricing policies with regards to the retail pharmacies are lawfully founded, the plaintiffs have sufficiently rebutted the defendants' "legitimate" assertions that retail pharmacies were refused discounts due to their inability to move market share. The record is replete with instances of collusive behavior, parallel conduct, uniformity of responses, mutual awareness of each other's policies and practices, and various incriminating quotes on the part of the defendants. While any one of these alone would not be sufficient to send the plaintiffs' case to a jury, any combination of the above is sufficient.

C. Whether the plaintiffs have presented evidence that tends to exclude the possibility that the defendants were pursuing their legitimate independent interests.

Even assuming that the evidence of conspiracy could be construed as ambiguous, the factors cited above by the plaintiffs tend to exclude the possibility that the defendants were pursuing independent, legitimate interests. *See Serfecz v. Jewel Food Stores*, 67 F.3d 591, 599 (7th Cir.

1995). In spite of evidence that the retailers could move market share (in some cases, better than the preferred customers), the defendants uniformly persisted in their refusals to extend discounts to this entire segment of the market. Portions of the record belie the defendants' contention that the retailers were refused the benefits of preferred customer status on account of the retailer's inability to influence the market. To the contrary, as discussed above, the record suggests that, having succumbed to the pressures of managed care, the manufacturers together set out to impose artificially high prices on the retail customers in order to retain their high profit margins. To this end, the evidence tends to support the plaintiffs' theory.

Because we find that, based on the totality of the record, an overall "inference of conspiracy is reasonable in light of the competing inferences of independent action," *Matsushita*, 475 U.S. at 588, the plaintiffs' Sherman Act claims may appropriately proceed to trial. Accordingly, the Manufacturer Defendants' motion for summary judgment is denied.

II. Manufacturer Defendants' Individual Summary Judgment Motions

Having determined that the record supports an inference of conspiracy among the Manufacturer Defendants, we now address the defendants' individual motions for summary judgment. As to the plaintiffs' Sherman Act claims, each of the twenty-four Manufacturer Defendants

moves for judgment in its favor.[19] In support, each defendant presents evidence in an effort to show that its pricing policy was the product of independent judgment and not due to any conspiracy participation.

As discussed at length above, at the heart of the plaintiffs' Sherman Act claims are allegations to the effect that the defendants collusively created and maintained a dual pricing system which raises or stabilizes the prices paid for brand name prescription drugs by retail pharmacies. In order to accomplish this goal, the plaintiffs maintain that manufacturers refused to make available to community pharmacies various discounts, rebates, and other price-lowering mechanisms that each of the Manufacturer Defendants had made available to managed care buyers.

On February 6, 1996, this court granted Defendant DuPont Merck Pharmaceutical's motion for summary judgment. *See In re Brand Name Prescription Drugs Antitrust Litigation*, 1996 WL 51210 (N.D.Ill. Feb. 6, 1996). Upon its formation in January 1991, DuPont Merck declared and thereafter employed a Single Price Policy, charging the same undiscounted prices for its brand name products to both managed care and retail pharmacies. DuPont Merck's adherence to such a policy,

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[19] As indicated above, on February 15, 1996, this court preliminarily approved a settlement agreement between the Class Plaintiffs and many of the Manufacturer Defendants. As between the Class Plaintiffs and the settling defendants, no motions for summary judgment are here considered. However, given that no settlement has been reached with the Individual Plaintiffs, each of the Manufacturer Defendants' motions for summary judgment will be addressed.

which by its very nature was antithetical to the "tiered" pricing policy at the heart of the alleged conspiracy, effectively distanced DuPont Merck from the plaintiffs' allegations. Although DuPont Merck participated in the chargeback system and was privy to discussions and meetings with the other manufacturers, DuPont Merck simply did not engage in the alleged proscribed conduct, i.e., DuPont Merck neither engaged in discriminatory pricing, nor did it charge Plaintiffs artificially high prices when compared to favored buyers. Summary judgment in DuPont Merck's favor was therefore appropriate.

Unlike DuPont Merck, each of the remaining Manufacturer Defendants has, during the relevant period, engaged in the two-tiered pricing scheme about which the plaintiffs complain. The extent to which each manufacturer has implemented such a policy varies, as do the circumstances surrounding such implementations. Not surprisingly, the defendants seek to capitalize upon these variances in an effort individually to distinguish themselves from other manufacturers and to distance themselves from any alleged conspiracy. Valiant efforts are made by each defendant to liken itself to DuPont Merck. While several present compelling arguments, none, however, is so strong as to warrant entry of summary judgment in its favor.

Although the Manufacturer Defendants suggest that the plaintiffs must build an entirely separate case against each defendant, this is not entirely true. Rather, in deciding a motion for summary judgment, the court in a federal antitrust case "should not view each piece of evidence in a vacuum":

> Seemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background against which the behavior takes place. Evidence can take on added meaning when viewed in context with all the circumstances surrounding a dispute. Thus, while we must carefully determine what inferences reasonably may be drawn from each piece of evidence, we must make this determination in light *of all of the evidence* proffered by [the plaintiffs].

Apex Oil Co. v. DiMauro, 822 F.2d 246, 255 (2nd Cir. 1987) (emphasis added), *cert. denied*, 484 U.S. 977 (1987); *see also Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690-698-99 (1962). Thus, to the extent that the defendants attempt to exonerate themselves by compartmentalizing their actions, these efforts must be construed within the greater context of all of the evidence submitted.

Perhaps the most critical component of the defendants' case is the propriety of the manufacturers' justification for refusals to offer discounts to retail pharmacies in light of existing contracts and discounts uniformly offered to managed care. The defendants have steadfastly maintained that managed care possesses an ability to move market share which the retail pharmacies do not possess. To the extent that a manufacturer reaches this conclusion independently, the asserted legitimacy of such a belief becomes more credible.

~~To~~ this end, manufacturers such as Boehringer Inhelheim, Burroughs Wellcome, SmithKline Beecham, Upjohn, and Warner-Lambert point to independent pricing studies which suggest that discounts to retailers

would not be profitable. Numerous other manufacturers assert that their policies were the result of unsuccessful attempts to offer certain discounts to retailers.[20] Defendants such as Burroughs Wellcome, Eli Lilly, Hoffmann-La Roche, and Pfizer strive to distinguish their pricing policies from the other defendants.[21] Defendants Abbott, Eli Lilly, Forest, and Zeneca claim that they were either not present or were not involved during critical meetings at which allegedly "conspiratorial conduct" occurred.

While such claims lend support to the notion that these manufacturers' decisions were independently founded, they do not detract from the substantial evidence submitted by the plaintiffs to the contrary. Indeed, with regards to the market share issue, the plaintiffs point to numerous instances in the record where manufacturers

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[20] Among the Manufacturer Defendants making such an argument are American Home Products, American Cyanamid, Bristol Myers Squibb, Boehringer Inhelheim, Burroughs Wellcome, G.D. Searle, Glaxo, Hoffmann-La Roche, Johnson & Johnson, Knoll Pharmaceuticals, Hoechst Marion Roussel, Rhone-Poulenc Rorer, Sandoz, Schering Plough, SmithKline Beecham, Upjohn, Warner-Lambert, and Zeneca.

[21] To this end, Burroughs Wellcome states that 50% of its products are single source products, and as to these products, no discounts are given to anyone. Eli Lilly maintains that it adhered to a single price policy until 1992. Pfizer asserts that it did not offer discounts to anyone on single source drugs until 1992. Hoffmann-La Roche notes that its primary market is hospitals and institutional care, not the retailer pharmacies. Other manufacturers make less convincing attempts to distinguish their policies, but virtually everyone, including those cited, has to some extent engaged in two-tiered pricing, the chargeback system, and a refusal to extend discounts to retail pharmacies.

(including those named above) have admitted that retail pharmacies can and do influence the market. Several examples illustrate the point:

* In enumerating the market forces that Defendant Abbott was "against" because they could negatively affect Abbott's market share and margins, Abbott listed the power of retail pharmacists first. Lehn Ex. No. 3, AB 70001155-56.

* When Defendant Knoll's competitor, Searle, granted retail pharmacists a 5%, one-time stocking allowance on a competitive product, Knoll was forced to respond immediately and "revise" its stocking allowance to "match" that of Searle. Turturro Ex. N. 13, KP 912627-28.

* According to Defendant SmithKline Beecham, "[r]etail pharmacies represent a large and important market where we have an excellent opportunity to significantly increase sales. Retail pharmacists can influence the product dispensed, . . . and they can provide [the manufacturer] with valuable information on physician prescribing habits." Fish Ex. No. 23, SK 200300496-99, SK 200301475-78.

* A January 1992 memorandum by Defendant Searle recognized that "Chains can have a significant influence over dispensing Searle products. . . . " Heady Ex No. 50, SE 49423-29.

* After visiting with the Big B pharmacy chain, Defendant Merck was "convinced that they have the determination, the financing, the ability to shift market share and the number of members which will justify offering the

PBM initiative to this organization . . . " Senich Ex. No. 118, MR 7232-36.

* Defendant Pfizer provided a one-time rebate to retailers for stocking the Pfizer product, MS Contin. Pfizer noted that "dollar claims [for the rebates] could be significant" and that the one-time promotion accounted for "a jump in monthly sales of MS Contin to this class of trade in September 1991 . . . . " Sackler Ex. No. 5, PF 000618-21.

* Defendant Eli Lilly has noted that "as we move into the nineties, it seems apparent that the decisions on prescription drugs are going to be very significantly influenced by non-physicians." The pharmacist was first on Lilly's list of such "influencers." Gall Ex. No. 14, LY 2181029-39.

The record is replete with similar reports within the pharmaceutical industry which warrant the conclusion that retail pharmacies had the ability to influence the market and that the manufacturers were conspicuously aware of that fact. To varying degrees, virtually every manufacturer acknowledged the power of the retailer, yet the retailer was given treatment persistently less favorable than that afforded to managed care.

While the presence of particulars such as independent studies and failed rebate programs might be sufficient for absolution absent other evidence of participation in a conspiracy, such evidence, when combined with the presence of the two-tiered pricing policies and the numerous exchanges which transpired regarding sensitive industry issues, fails to rebut the inference of manufacturer participation in a conspiracy. Similarly, the

failure to attend all blameworthy industry functions, taken alone, might be sufficient for manufacturer exoneration. However, when viewed in light of all of the other evidence indicated throughout this opinion, entry of summary judgment cannot be appropriate.

Although each manufacturer aspires to distinguish itself from the next, several commonalities emerge from the record. The record indicates, for example, participation by virtually every manufacturer in industry meetings and seminars to discuss strategies that should be followed in setting prices for brand name prescription drugs. Similarly, virtually every manufacturer participated in surveys and inquiries conducted by other defendants regarding pricing policies. Additional common threads emerge. Every manufacturer, for example, was directly involved with the implementation of a chargeback system through which manufacturer discounts were extended to favored purchasers. Every manufacturer further participated in discussions and agreements pertaining to their refusals to bid to retail buying groups and the maintenance of differential pricing. Finally, with recent and limited exceptions, every manufacturer has refused to offer discounted pricing to retail pharmacies and retail buying groups. As to this last observation, evidence of the defendants' uniformity of conduct can be summarized by a May 25, 1990 letter from the President of Schering Laboratories, declining to offer discount pricing to a community pharmacy. The letter explained, "we limit our bidding to institutions with closed populations, such as staff model HMO's; hospitals, non-profit clinics serving indigent patients; non-profit charitable organizations, and Federal, State, County and

City institutions. *This practice is employed by virtually all of our competitors."* Kogan Ex. 20 (emphasis added).

When cast amidst all of the existing evidence, the individual differences in policy and practice among the manufacturers diminish markedly in significance. Individual differences notwithstanding, unlike DuPont Merck, each of the remaining defendants utilize (albeit to varying degrees) a two-tiered pricing policy which maintains prices to the retail segment of the market, and, with limited exceptions, each manufacturer has refrained from discounting to that segment. Each manufacturer, moreover, has had ample opportunity to conspire and has engaged in conduct and adopted policies consistent with conspiratorial participation. Thus, while several of the defendants present compelling arguments to the contrary, the record nonetheless supports an inference that each of the Manufacturer Defendants engaged in conduct from which the existence of a conspiracy and membership therein may be fashioned.

As we have previously recognized, "summary procedures [are to] be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting*, 368 U.S. 464, 473 (1962). Acknowledging the wisdom of this principle, we conclude that the culpability of each Manufacturer Defendant is more appropriately left to the jury. Because the record finds substantial support for each manufacturer's participation in the alleged conspiracy, the twenty-four individual motions for summary judgment are denied.

III. Wholesaler Defendants' Motions for Summary Judgment

The essence of the Sherman Act claims brought by the plaintiffs is a "conspiracy to keep the prices paid by retail pharmacies artificially high by denying discounts to retail pharmacies on brand name pharmaceutical products." Managed care health care organizations are able to buy brand name prescription drugs at discounted prices. The Wholesaler Defendants are charged with membership in the conspiracy and, accordingly, are alleged to be in full agreement with the manufacturers in unlawfully discriminating against the retail pharmacies.

Under well-settled principles of conspiracy law, in order to establish that the wholesalers are as fully answerable at law for their conduct as the manufacturers, the evidence must show that they "had a conscious commitment to a common scheme designed to achieve that unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). To sustain the charge of conspiracy to keep prices artificially high by denying discounts to the plaintiffs, the plaintiffs must prove the existence of the conspiracy and a participatory link with the Wholesaler Defendants. A defendant's mere knowledge of, approval of, association with, or presence at a conspiracy is insufficient to establish the participation element. *United States v. Durrive*, 902 F.2d 1221, 1224 (7th Cir. 1990). Although *Durrive* is a criminal case, the holding that an individual defendant's participation in an established conspiracy must be supported by substantial evidence in order to be sustained applies to civil cases as well.

There is no evidence, direct or circumstantial, in the entirety of this massive record that the wholesalers had *any* involvement in the decisions not to afford discounts to the plaintiffs. And this void in the evidence exists, irrespective of whether the decision not to give discounts was made collectively by the manufacturing defendants pursuant to the charged conspiracy, or whether these were a series of independent, albeit similar, policies made for innocent business reasons unique to each manufacturer. The wholesalers were not consulted about the no-discount policies prior to or during their implementation, and no evidence exists that the wholesalers' position was considered by or carried any weight with the manufacturers. On the precise question of the no-discount conspiracy charge and the conscious commitment to achieve the unlawful objective, the evidence is conspicuously absent as to the wholesalers. In truth, the wholesalers had nothing to do with the no-discount policies.

Indeed, the more compelling evidence is that the wholesalers decried the very no-discount pricing policies which the plaintiffs allege is the essence of the charged conspiracy. The retail pharmacies constituted the most important customers of the wholesalers in terms of sales. As the former's unhappiness with differential pricing increased, so did the wholesalers. As early as 1985, the National Wholesale Druggist Association ("NWDA") issued a position statement criticizing differential pricing if such pricing did not take into account actual marketplace functions. The wholesalers advised the manufacturers that "as a result of the differential pricing system retail pharmacies could not compete on a level playing

field." Wholesaler Defendants Rule 12 (N) Stmt. ¶ 18 at 40.

As reflected in the wholesaler defendants' reply memorandum at pages 33-35, the following items are disclosed by the record in the references noted:

1. in 1986, Bud Albers, a wholesaler and ex-Chairman of the NWDA, began publishing position papers that were sent to manufacturers, among others, complaining about preferential pricing and advocating legislative reform to protect independently owned and operated enterprises;

2. in a March 1986 meeting of the NWDA Board, the NWDA adopted a position statement that criticized preferential pricing as the root cause for illegal diversion;

3. the NWDA, at various times, told the manufacturers that differential pricing put pressure on independent pharmacies and threatened their survival;

4. at a 1989 NWDA regional meeting, wholesalers told manufacturers that a one price policy to all levels of trade would eliminate most pricing problems and recommended that the free enterprise system determine profit margins.

The record contains many other references similar in nature about the wholesalers' consistent opposition to the two-tiered pricing policy. This conduct is antithetical to membership in the charged conspiracy. Even assuming an agreement by manufacturers, this evidence reflects *non-agreement* by the wholesalers. Expressed opposition to the manufacturers' two-tiered pricing policies serves to

defeat membership by the wholesalers in the conspiracy charged.

The substance of the wholesalers' position, as reflected through NWDA, is perhaps best captured during President Clinton's hearings and proposals involving the health care industry in general. In connection with the proposed Health Security Act, the NWDA reaffirmed its opposition to two-tiered pricing and explained that it had a long-standing policy that the pricing and promotion of products should be based on a true functional difference among customers and not on an artificial class of trade. Colbath Reply Aff. Exh. O at MCK AB 01609. The reason offered for this position was to enhance the community pharmacy's ability to compete. These pharmacies were the wholesalers' major customer segment. *Id.* at MCK AB 01610.

The plaintiffs ignore the fact that the wholesalers had nothing whatsoever to do with the adoption of the "no discount to retail pharmacies" policies practiced by the manufacturers, ignore wholesaler opposition to those policies, and concentrate instead on the wholesalers' participation in the chargeback system. As described previously, purchasers of brand-name prescription drugs by managed care operators and others were able to obtain discounts from the manufacturers on certain drug purchases. In so doing, these favored groups negotiated the discounts *directly* with the manufacturers. Wholesalers are not involved in the manufacturer's decision whether to extend discounts to any particular customer, the products to be discounted, or the prices the manufacturer extends to such customers. Although some customers purchase directly from the manufacturer, the use

of wholesalers in the distribution chain is the common method employed in the movement of these drugs.

When the wholesaler is used, the terms under which the wholesaler provides inventory and delivery service, variously referred to as the wholesaler's service charge, upcharge, delivery charge or some similar term, are determined by the customer and wholesaler without participation by any manufacturer. The wholesaler generally sells to the customers all of its products in exactly the same way, including those subject to the manufacturers' discount. The price terms are the wholesaler acquisition cost plus the service charge negotiated between the customer and wholesaler.

Although some negotiated discounts are not handled through chargebacks, most are. Some involve a rebate directly from the manufacturer to the customer with no involvement by the wholesaler. Chargebacks are generally preferred by customers because they allow for the payment of the discount price immediately rather than wait for a rebate to be paid. Under the chargeback system the wholesaler charges back to the manufacturer the difference between the price the manufacturer and customer negotiated and the price paid by the wholesaler. The effect of the chargeback system is that the wholesaler finances the amount of the discount for a certain period of time. The benefit to the customer is that only the net amount of the cost of the goods is paid (price of goods to wholesaler plus service charge minus discount). The benefit to the manufacturer is the assumption by the wholesaler of the burden in administering the discount and the temporary cost of financing it.

The reasons the wholesalers participate in the chargeback system are both documented and obvious. *See* Wholesaler Defendants Rule 12(M) Stmt. ¶ 20 at 14. They include:

1. failure on the part of the wholesaler to participate in chargebacks presents the substantial risk of losing a significant amount of business, including all business represented by sales to contract buyers that are not handled through chargebacks;

2. participation in the chargeback system offers a wholesaler the opportunity to increase its business;

3. failure to participate in chargebacks may result in the manufacturer dealing directly with the contract customer for all purposes (and not merely the negotiation of the discount); and

4. loss of business to a competing wholesaler not adverse to the chargeback system.

This Court has repeatedly held that the chargeback system, standing alone, is not illegal. Even the class plaintiffs concede that holding. What the plaintiffs do contend, however, is that the chargeback agreements were a "component of defendants' unlawful price-fixing scheme."

We need look no further than the affidavits and testimony of class plaintiffs experts to see what "component" of the price-fixing conspiracy the chargeback allegedly represented. Dean Wesly A. Magat, in discussing the collusive agreement to deny discounts to the retailers, testified that this collusive agreement revolved around

the chargeback system, of which the wholesalers are an integral part. Magat Dep. 420. He testified that the chargeback system enables the manufacturers to sell their products at different prices to different buyers and avoid arbitrage, which would undercut the profitability of that practice. *Id.* at 420, lines 11-15. The "avoidance of arbitrage" is the "key element" of the chargeback system and permitted the implementation of differential pricing.

Professor Jeffrey M. Perloff shared Dean Magat's view. Professor Perloff opined that the maintenance of the alleged conspiracy required the prevention of arbitrage or diversion. Perloff Aff. ¶ 7. According to Professor Perloff, participation of the wholesalers was necessary because the manufacturers could not otherwise prevent or curtail arbitrage (selling of pharmaceuticals by the favored buyers back to wholesalers who would then sell the arbitraged goods to retailers at discounted prices). Perloff Aff. Ps 7, 8, 10, 11; Magat Dep. 442 & 443. According to Professor Perloff, preventing diversion was critical to the alleged conspiracy of denying discounts to retail pharmacies; it was so integral to the conspiracy that there could be no conspiracy without it.

These contentions by both Dean Magat and Professor Perloff manifest ignorance of one of the most fundamental characteristics of the brand name prescription drug industry in the United States. Accordingly, their opinions are rendered virtually worthless. Indeed, the class plaintiffs recent retention of Professor Perloff and the request of him to prepare a report on the wholesalers' participation in the cartel after another expert refused to write such a report lends credence to the notion that his opinion was contrived. The idea of a carefully developed

position based on full and relevant information, reached after appropriate analysis and tested by acceptable criteria, the hallmark for the admissibility of expert testimony, is lacking here.

The opinions by Professor Perloff and Dean Magat that wholesalers refrained from engaging in diversion or arbitrage because they were members of the conspiracy spawned by the manufacturers are absurd. The Prescription Drug Marketing Act of 1987 (PDMA) prohibits, subject to exceptions not relevant here, resales of prescription drugs by health care entities, hospitals and charitable organizations. It was not some secret agreement with the manufacturers which precluded the wholesalers from acts of diversion and arbitrage, rather it was their compliance with federal law. Conforming one's conduct to the requirements of the law has never been, heretofore, confused with secret and illegal agreements evidencing anti-trust violations.

The plaintiffs and their experts also ignore another fundamental precept of health care law. In *Abbott Laboratories v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1 (1976), the Supreme Court held that discounted pricing of pharmaceutical products sold to non-profit hospitals could violate the Robinson-Patman Act unless the products were for the hospital's "own use." One way for the manufacturer to assure the "own use" safeguard was to receive a certification of "own use" from the hospital. The plaintiffs' conspiracy theory would not only require the defendants to violate the PDMA but also to violate contractual provisions, certifying "own use" by hospitals, with accompanying complicity by wholesalers in the resale of the pharmaceuticals purchased at a discount.

Not surprisingly, no evidence is cited to support those opinions. Frankly, none exists.

Notwithstanding their stated acceptance of the principle that it takes more than mere participation by the wholesalers in the chargeback system in order to support status as co-conspirators, the plaintiffs merely give lip service to that holding. Based on their legal submissions, it is clear that chargebacks remain the centerpiece of the plaintiffs' case against the wholesalers. Professor Perloff is relied on heavily for the claimed correlation between the chargeback system and membership in the charged conspiracy by the wholesalers. He opines that because most sales to both retail pharmacies and favored groups were through wholesalers and because the wholesalers were at the center of the chargeback system, the wholesalers had to have been aware of the differential treatment accorded retail pharmacies and the favored group of purchasers. The wholesalers had to have "known that the manufacturers generally offered discounts only to certain favored groups of buyers and did not offer such discounts to retail pharmacies." Perloff Aff. ¶ 4.

These promulgations do not aid the plaintiffs. As pointed out earlier, it is not illegal for the wholesalers to participate in the chargeback system. Additionally, it is improper to equate knowledge of another's practice with knowing participation in an illegal conspiracy. Professor Perloff's opinions ignore substantial evidence with respect to the chargeback system and the wholesalers' involvement therein.

The wholesalers' knowledge of the manufacturers' two-tiered pricing system and their participation in the

chargeback system does not equate to knowledge that the pricing system was the product of an illegal conspiracy. Material relied upon by plaintiffs' own experts confirms that differential pricing of pharmaceutical products can result from competitive pressures. In opposition to the wholesaler defendants' previous summary judgment motion (*see* Colbath Aff. Exh. C), class plaintiffs' submitted an affidavit from Prof. Morton Kamien which attached materials he relied upon in formulating his opinion. Prof. Lucas testified that he read and relied upon the Minnesota Prescription Drug Study. Lucas Aff. ¶ II.1, List of Materials Reviewed, p. 11.

By relying upon Prof. Lucas' work, Prof. Perloff also embraces Prof. Kamien's earlier affidavit and the Minnesota Prescription Drug Study. The report is dated April 1994 and was prepared by a division of the Minnesota Department of Health. These materials included a report entitled: "Prescription Drug Study: A Report to the Minnesota Legislature on the Prescription Drug Market" (hereinafter the "Minnesota Prescription Drug Study). After reviewing the use of formularies by institutional pharmacies, the Minnesota Drug Prescription Study concludes:

> All types of pharmacies can move volume, but retail groups have little or no power to offer market share to manufacturers because they must stock drugs for several different third-party payers, all with different formularies. Hospital buying groups and managed care formularies can provide market share to manufacturers and shift all non-formulary drugs to those

> in the formulary. Formularies are what distinguishes third-party payer and hospital pharmacy bargaining positions from retail pharmacy buying group.

In addition to their prevention of diversion and arbitrage arguments, the plaintiffs offer another reason why the wholesalers joined the manufacturer conspiracy. Plaintiffs claim that the manufacturers rewarded wholesalers for their participation in the charged conspiracy by facilitating speculative buying programs by wholesalers. Speculative buying is the practice of buying programs based on, and in advance of, anticipated price increases.

There are a number of weaknesses in this theory. First, there is no evidence correlating the buying programs to the charged conspiracy. Second, the evidence establishes that these buying programs are common and found in many industries. Third, the plaintiffs engage in the very practice they condemn, and are frequently the beneficiaries of the wholesalers' acumen when price increases later ensue. Finally, there is clear and uncontradicted evidence that the manufacturers frequently took steps to discourage these practices altogether. The plaintiffs' attempt to label these buying practices as a reward to wholesalers for their contributions to an illegal conspiracy is entirely fanciful.

The plaintiffs raise certain other matters such as the sale of information as evidence of wholesaler complicity in the manufacturers' conspiracy. None of these items merits discussion. They are all without the probative value needed to sustain the premise. These other matters are normal business practices, engaged in by many, and

as consistent with innocence as with guilt, usually more so.

Class plaintiffs also contend that the expert opinions offer an independent basis for denying the wholesalers' motion for summary judgment. Even assuming admissibility in evidence of all of the opinions of their experts (many of which are not), the plaintiffs are wrong.

As previously discussed, Professor Perloff testified that the inclusion of the wholesalers in the putative cartel was necessary to prevent arbitrage – the resale of discounted product to retail pharmacies. Perloff Aff. ¶¶ 5, 7 8, 10, 11 (Colbath Reply Aff. Exh. B). So critical was the prevention of arbitrage (and thus, inclusion of the wholesalers), that Prof. Perloff believed that the cartel could not exist in its absence. Perloff Aff. ¶ 5; Perloff Dep. 79:17-81:14, 158:11-24.

Professor Perloff apparently had never read the PDMA, which, as plaintiffs concede, criminalized resale of prescription drugs by "health care entities." Additionally, in some cases contractual restrictions imposed by manufacturers with no wholesaler involvement restricted resale to the manufacturers' other contract buyers. In sum, the lack of arbitrage found so suspect by Prof Perloff (indeed a "key" element to his opinion that the wholesalers conspired. Perloff Dep. 101:22-102:4) cannot be explained by the presence of wholesalers in the distribution system. *See* Perloff Dep. 158:13-24, and discussion of Sec. II. F. *supra.* Dean Magat's testimony is equally deficient.

Dr. Lucas, the Nobel Laureate economist, confirmed the complete breakdown of plaintiffs' theory of wholesaler conspiracy:

Q. Under your theory of conspiracy . . . if [a wholesaler] stopped conspiring as you've hypothesized the conspiracy, what would it do differently than it's doing now?

A. I'm not sure.

Q. Would it do anything differently?

A. I don't know.

Lucas Dep. (10/31) 41:14-23. Dr. Lucas' testimony reflects the failure of plaintiffs' proof. When asked if he could distinguish between conspiring and non-conspiring wholesalers, Dr. Lucas answered: "No." *Id.* at 43:12-21. Dr. Lucas adds nothing to the case against the wholesalers.

The plaintiffs state that the wholesalers joined the conspiracy and did so out of greed. Survival may be the more accurate description for their involvement in the chargeback system. While the plaintiffs use words and phrases such as "windfall," "huge profits," and "dramatic" to describe wholesaler profit levels, the evidence is at odds with such adjectives. According to the 1994 Minnesota Prescription Drug Study, the net operating margins of drug wholesalers have remained at almost identical low levels since at least 1975, while their operating expenses have decreased five-fold:

Year	1975	1980	1985	1990	1992
Operating Expenses	11.0%	8.5	6.2	4.4	2.3
Profit Margin	2.0%	2.6	2.4	2.4	2.3

Thus, the Minnesota Study also makes it clear that wholesalers have passed along to their customers the fruits of

their efforts to wring increased efficiencies out of the drug distribution industry.

An analysis conducted under the auspices of the NWDA confirms wholesalers' profit levels. This study indicates that wholesalers' average net profit (after tax) in 1988 was 1.13%, with an operating margin of 2.35%; this is in sharp contrast to the alleged average manufacturers' 1988 operating margin of more than 22%. Moreover, wholesalers' average return on assets (after tax) in 1988 was 4.67%; the analysis, stating the obvious, notes that "[t]his is not an acceptable return on investment." In contrast, retail pharmacies' return on assets in 1988 was 6.6%, and manufacturers' average return exceeded 28%. *See* Wholesale Drugs Magazine; NWDA Breakthrough: A Future by Design at 10-12 (Colbath Reply Aff. Exh. T).

Plaintiffs' insinuation that the wholesalers' "enjoyment" of these profit levels was the inducement or payoff for collusive behavior, or that these profit levels rise to "windfall" proportions, is belied by objective and uncontroverted evidence. Wholesaler margins are flatly inconsistent with a conclusion of antitrust conspiracy.

What the evidence more truly reflects is the wholesalers' desire to continue its historical role in the distribution chain. There were expressed fears of a mere warehousing function for their members. Recognition of the economic power of the manufacturers is apparent throughout this record, as is the wholesalers' grudging accession to some of the manufacturers' practices. The chargeback system was but one example. Participation in that system costs the wholesalers money. But when a manufacturer deals directly with a wholesaler's customer

with respect to the price the customer will pay to that wholesaler, fears of a further reduced role in the distribution chain are apparent. The retail pharmacies were the wholesalers best customers and, when they were unhappy, the wholesalers shared their unhappiness.

The record clearly establishes the wholesalers' dislike and disapproval of the two tiered pricing system, the very essence of the plaintiffs' conspiracy charge. Participation in the chargeback system is far more an example of the pressures facing the wholesalers than evidence that they jumped on the manufacturers' illegal price-fixing bandwagon. The independence wholesalers enjoyed in establishing prices and terms in the sale of their goods to their customers has been eroded because of the contracts entered into by the manufacturers and those very customers. The role the pharmaceutical manufactures occupied in the healthcare industry, along with their economic power and the importance of their marketing decisions, more compellingly explains the chargeback system rather than theories of wholesaler complicity.

This view has actually been foretold in this case. Plaintiffs' counsel were apparently willing to dismiss claims against the wholesalers for no money whatsoever. *See* Affidavit of J. Thomas Rosch ¶¶ 3, 4 (submitted as Exhibit B to Memorandum in Opposition to Class Plaintiffs' Motion to Declare Defendants' Judgment Sharing Agreement Unlawful) (Colbath Reply Aff. Exh. U). The principal desire appears to have been in obtaining an assignment from the wholesalers of such antitrust claims as the wholesalers may have had against the manufacturers. It is doubtful that a plaintiff who has a viable cause of action against an anti-trust violator would give

up that cause of action for no money. A plaintiff who accuses another of being a conspirator would generally not seek an assignment of their claims against a co-conspirator. A plaintiff would also not include the wholesalers as members of the plaintiff class, as several of the attorneys representing class plaintiffs apparently once did in this case. Among the numerous complaints presently before the Court, it is telling that the wholesalers are defendants only in the class case.

The status of the wholesalers as proper defendants has been previously raised in this case. The defendants claimed that the wholesalers were added in a transparent attempt to avoid the holding in *Illinois Brick*. We denied motions to dismiss or for judgment at that time for, among other reasons, the fact that the motions were premature and the plaintiffs were entitled to the opportunity to develop evidence during discovery in support of their well-pleaded complaint. Although afforded the chance to do so, the plaintiffs have failed to produce evidence which would permit a reasonable jury to conclude that the wholesalers were members of the conspiracy charged, even assuming that such a conspiracy existed. Indeed, a review of the evidence not only supports the view that the Wholesaler Defendants were never members of any conspiracy, it is compelled by it. No reasonable jury could conclude otherwise. For these reasons, the motions of the wholesalers for summary judgment are granted.

IV. Manufacturer Defendants' Motions for Summary Judgment on the Indirect Purchaser Claims

On October 24, 1994, this court issued a memorandum opinion denying the Manufacturer Defendants' motion for a judgment on the pleadings or, in the alternative, for summary judgment. The focus of that opinion was the effect on the present case of the United States Supreme Court's decision in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977). Faced with allegations of a giant vertical price-fixing conspiracy whereby the Manufacturer Defendants and the Wholesaler Defendants "acted jointly and in concert to fix, raise, maintain and stabilize the prices which they charged retail pharmacies for Prescription Brand Name Drugs," see Consolidated and Amended Class Action Complaint at ¶ 80(a), we concluded that *Illinois Brick* did not apply. Massive discovery has been conducted since the issuance of the 1994 opinion, and the posture of the case has changed considerably. Accordingly, we feel compelled to revisit the issue of *Illinois Brick*.

In *Illinois Brick*, the plaintiff, the State of Illinois, brought suit against the manufacturers and distributors of concrete blocks, alleging a conspiracy to fix prices in violation of the antitrust laws. The concrete blocks were sold by the manufacturers to masonry contractors who used them in masonry structures. General contractors then used these structures in buildings which were ultimately sold to the state. *Illinois Brick*, 431 U.S. at 726-27. The plaintiff claimed that the intermediaries in the chain

of distribution, the masonry contractors and general contractors, "passed on"[22] the increased fixed prices to the plaintiffs. The Supreme Court denied the plaintiffs recovery, holding that as an indirect purchaser in the chain of distribution, the plaintiff was precluded from seeking damages for illegal overcharges passed on to the plaintiff by intermediates in the distribution chain who purchased directly from the manufacturers. *Id.* at 746.

In so holding, the Supreme Court relied upon an earlier decision in *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). In *Hanover Shoe*, the Court held that an antitrust violator could not defend a suit by a direct purchaser on the basis that the purchaser had not been injured because it had "passed on" an illegal overcharge to its own customers. *Hanover Shoe*, 392 U.S. at 494. Viewing the situation in *Illinois Brick* as an offensive use of this pass-on theory, the Court in *Illinois Brick* concluded that symmetry required a bar of the offensive use of the pass-

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[22] "Pass-on" is a process by which an entity in a chain of distribution adjusts its price upward to compensate for an overcharge by a prior party in the chain. Comment, The Indirect Purchaser's Right to Sue Under Section 4 of the Clayton Act: Another Congressional Response to Illinois Brick, 32 Am.U.L.Rev. 1087, 1087 n.2 (1983). Normally, this occurs when sellers pass on costs downward in the chain of distribution from the manufacturer to the ultimate purchaser. *Id.* However, the reverse can also occur. *Id.* Passing on costs spreads the effect of anticompetitive activity beyond the direct purchaser or seller to all buyers and sellers in the chain of distribution. *Id.* The result is that the ultimate buyer or seller often bears the cost of the overcharge. *See* Note, Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation, 63 Cornell L.Rev. 309, 311 (1978).

on rationale by indirect purchasers in the distribution chain. *Illinois Brick*, 431 U.S. at 736. As such, the plaintiffs could not recover against the block manufacturers.

The Manufacturer Defendants analogize their situation to that of the block manufacturer defendants in *Illinois Brick* and assert that, as in *Illinois Brick*, the plaintiffs, as indirect purchasers, are precluded from bringing suit against them. In 1994, we rejected the defendants' assertion, concluding that *Illinois Brick* did not apply to the vertical conspiracy which the plaintiffs alleged in their complaints. A flood of discovery submissions followed, and after an exhaustive evaluation of the evidence, it has become apparent that the massive vertical conspiracy alleged to have existed and prospered among the Manufacturer Defendants and the Wholesaler Defendants, even if we assume a conspiracy, was not vertical at all. Rather, any alleged illegalities occurred at the Manufacturer level; culpability at the Wholesaler level was lacking. As alleged by the plaintiffs, *Illinois Brick* poses no bar to the plaintiffs' case against the Manufacturer Defendants. As established, however, the effect of the so-called indirect purchaser rule set forth in *Illinois Brick* requires some reexamination.

When the Supreme Court decided *Illinois Brick* in 1977, the opinion was not without its critics. In a potent dissent, Justice Brennan labeled the Court's decision a "regrettable retreat" from the broad and comprehensive scope which the antitrust laws had, until that time, sought to effectuate. *See Illinois Brick*, 431 U.S. at 749 (Brennan, J., dissenting). As expressed in the dissent:

> The Court today regrettably weakens the effectiveness of the private treble-damages action as a deterrent to antitrust violations by, in most cases, precluding consumers from recovering for antitrust injuries. For in many instances, consumers, although indirect purchasers, bear the brunt of antitrust violations. To deny them an opportunity for recovery is particularly indefensible when direct purchasers, acting as middlemen, and ordinarily reluctant to sue their suppliers pass on the bulk of their increased costs to consumers farther along the chain of distribution. Congress has given us a clear signal that § 4 is not to be read to have the restrictive scope ascribed to it by the Court today. I would follow the congressional understanding and therefore would affirm.

Id. at 764-65 (Brennan, J., dissenting). Notwithstanding these early criticisms, nearly twenty years after the issuance of *Illinois Brick*, the Court adheres to its doctrine and has permitted few exceptions to the indirect purchaser rule.

That is not to say, however, that exceptions to the indirect purchaser rule do not exist. In *Illinois Brick*, the Court explicitly recognized at least two such exceptions. Under a pre-existing cost-plus contract, the first exception to the "pass-on" situation, the purchaser pays a specified markup above the seller's own cost for a fixed quantity of the product. *See Id.* at 736. The commitment of the customer to buy a fixed quantity of the product regardless of the price insulates the seller from any injury in the form of a decrease in sales that might result if prices increased. The effect of the overcharge is therefore

determined in advance, "without reference to the interaction of supply and demand that complicates the determination in the general case." *Id.* In such a case, the indirect purchaser rule does not apply.

The second exception recognized by the Court in *Illinois Brick*, the so-called "control" exception, involves the scenario where a direct purchaser is owned or controlled by its customer. *Id.* at 736 n.16. The most common control situation, however, is where the indirect purchaser alleges that the antitrust defendant effectively controls the direct purchaser. Although the control exception has most successfully been utilized where the direct purchaser is a subsidiary or is otherwise owned by the alleged violator, *see, e.g., In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13 (3d Cir. 1978), the essence of the *Illinois Brick* exception is that the degree of control exercised by the defendant effectively transforms the transaction – from defendant to middleman to indirect purchaser – into one sale. *See Jewish Hosp. Ass'n. of Louisville, Kentucky, Inc. v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 975 (6th Cir. 1980) (limiting "control" exception to relationships "involving such functional economic or other unity between the direct purchaser and either the defendant or the indirect purchaser that there effectively has been only one sale"). In such a circumstance, market forces are superseded and the rationales of *Illinois Brick* do not apply.[23]

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[23] Indirect purchasers have also sued for treble damages under the "co-conspirator" or "vertical conspiracy" theory. Under this theory, the direct purchaser is alleged to have conspired with the antitrust defendant. *See, e.g., Link v.*

The plaintiffs allege the existence of a massive vertical conspiracy among the manufacturers and the wholesalers. Without the wholesalers as co-conspirators, however, the plaintiffs' allegations of such a conspiracy crumble. Absent the wholesalers, the viability of the plaintiffs' Sherman Act claims hinges upon the applicability of *Illinois Brick*. The issue thus becomes whether the plaintiffs' Sherman Act claims against the Manufacturer Defendants, absent the presence of the wholesaler middlemen, is barred by the Supreme Court's decision in *Illinois Brick v. Illinois*.

At first glance, the answer to this question would appear to be in the affirmative. The vast majority of prescription drugs purchased by retail pharmacies are supplied by wholesalers, who, in turn, deal with the manufacturers. Retail pharmacies do not, in other words, receive their goods directly from the alleged antitrust offenders, i.e., the Manufacturer Defendants. Being indirect purchasers in the chain of distribution, *Illinois Brick* thus would seemingly bar the retail pharmacies from

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Mercedes-Benz of N. Am., 788 F.2d 918, 929 (3d Cir. 1986). *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980). Although the vertical conspiracy is termed an "exception" by most courts, *cf.*, *In re Brand Name Prescription Drugs Antitrust Litigation*, 867 F.Supp. 1338 (N.D.Ill. 1994) (*Illinois Brick* does not apply to allegations of vertical conspiracy), technically, the vertical conspiracy does not involve pass-on damages because the so-called "indirect purchaser" is the party directly injured by the antitrust violation. *Arizona v. Shamrock Foods, Co.*, 729 F.2d 1208, 1211 (9th Cir. 1984), *cert. denied*, 469 U.S. 1197 (1985). Although the plaintiffs' have alleged such a conspiracy in the present case, for the reasons stated in this opinion, such allegations have not been sufficiently demonstrated.

pursuing their Sherman Act claims against the drug manufacturers. A close examination of the evidence, however, does not yield this conclusion.

The gravamen of the plaintiffs' Sherman Act claims is the defendants' "collusive" creation of a dual pricing system which raises or stabilizes the prices which retail pharmacies pay for brand name prescription drugs. In order to accomplish this goal, the plaintiffs submit evidence of a uniform refusal by the Manufacturer Defendants to make available to community pharmacies various discounts, rebates, and other price-lowering mechanisms that each of the Manufacturer Defendants had made available to managed care. Although the plaintiffs contend otherwise, the evidence does not suggest that the wholesalers were an integral component of such a conspiracy. Instead, the evidence shows that *the Manufacturer Defendants exercised total control over the principal pricing decisions, both with regards to the wholesalers and with regards to the purchasers at the level of retail pharmacies and managed care.* It was the manufacturers' pricing policy, and the manufacturers enforced it.

The record is replete with evidence suggesting that the Manufacturer Defendants alone decided not to afford discounts to the retail pharmacies. The wholesalers were not consulted regarding the no-discount policies prior to or during their implementation, nor was the wholesalers' position on the subject considered or given any significance. Instead, the evidence suggests that the no-discount pricing policies which the plaintiffs allege actually harmed the wholesalers. The retail pharmacies constituted the wholesalers' greatest customer base – as the retailers became more disgruntled by the high prices they

were forced to pay on account of the manufacturers' pricing policies, the wholesalers bore the impact of the complaints and realized very little profit.

It was the manufacturers alone who determined, regardless of reason, that no discounts would be afforded to the retail pharmacies. Similarly, it was the manufacturers who established the discounting policies afforded to managed care. Through the use of the chargeback system, discounts were negotiated as a matter of contract between the manufacturers and managed care. Although a wholesaler still technically supplied the drugs to the managed care customer, all of the major pricing decisions were made "directly" between the manufacturer and managed care, a so-called "indirect purchaser."

The wholesaler paid the manufacturer the price it charged for the goods (wholesale cost), and the manufacturer and the customer (purchaser of the wholesaler's goods) negotiated directly with respect to any discounts to be given. The wholesaler's fee, negotiated directly by the wholesaler and customer, was a relatively modest portion of the total cost of the drugs to the purchaser. The wholesaler paid the same price for the drugs regardless of whether the customer was classified by the manufacturers as "preferred" or not. The manufacturers dictated to the wholesalers precisely who was or was not to receive discounts, what drugs were to be discounted, and exactly how much was to be charged. The wholesalers acquiesced by charging the manufacturers' "selected" preferred customers the prescribed discount, which was a price below the wholesalers' cost, and then receiving a reimbursement from the manufacturers for the difference.

Such benefits were not extended to the retail pharmacies, and given the way in which the chargeback system was structured by the manufacturers, the wholesalers were not in a financial position to stray from the manufacturers' preferred list. Simply put, the wholesalers functioned as glorified warehouses in these circumstances, facilitating transactions in accordance with the manufacturers' instructions. Under such a scheme, where the actions of the intermediary are so totally dictated by the alleged antitrust violator, we do not believe that the indirect purchaser rule of *Illinois Brick* should apply.

The Supreme Court in *Illinois Brick* articulated at least two major policy reasons for denying the indirect purchaser's recovery in a Sherman Act case. The first concern was that of multiple recovery. The Court reasoned that if indirect purchasers were permitted to sue for overcharges passed on to them from indirect sellers, a substantial risk of duplicative recovery would be created. *See Illinois Brick*, 431 U.S. at 737. Under *Hanover Shoe*, a seller could not raise a passing-on defense in a suit brought by intermediates, thus the intermediates could recover from the sellers the whole of the proven overcharge. If the indirect purchasers were also permitted to recover damages for the passed-on overcharges, multiple recovery would occur. The seller would be fully liable to both the intermediates and the indirect purchasers. *Illinois Brick* sought to avoid the unfairness of such a result.

The second policy notion with which *Illinois Brick* was concerned involved the complexities of tracing damages passed-on throughout the various stages of the chain of distribution. *Id.* The existence of the tracing issue derived from the difficulties encountered in attributing

price increases, or any portion thereof, directly to the illegal overcharge as opposed to other forces which could affect the market (e.g., supply and demand). *In re Mid-Atlantic Toyota Antitrust Litigation*, 516 F.Supp. 1287, 1292-93 (D.Md. 1981), *aff'd*, 704 F.2d 125 (4th Cir. 1983). Thus, the concern in *Illinois Brick* focused upon the complexities of evaluating the injury which indirect purchasers sustained by illegal overcharges passed on through the distribution chain.

As the Supreme Court recognized in *Illinois Brick*, situations arise where these policy concerns are not implicated, and in such cases, the indirect purchaser rule has no application. As noted above, one such circumstance explicitly identified by the Supreme Court is that where the intermediate is under the control of the antitrust defendant. To the extent that this relationship unifies into one sale the transaction between the antitrust defendant and the indirect purchaser plaintiff, the policy concerns articulated in *Illinois Brick* do not apply, and the "indirect" purchaser's action will not be barred.

In the present case, strong support in the record exists for the notion that the wholesalers served as pseudo-warehouses, wielding little or no decisionmaking power with regard to their pricing policies. Wholesaler acquiescence was necessary for wholesaler survival. Without the manufacturers, the wholesalers could not exist. The reverse was certainly not true. Although the drugs were technically sold through wholesalers, the manufacturers effectively dictated the wholesalers' policies as to all of the so-called indirect purchasers. Certainly where managed care was concerned, the transaction from manufacturer to wholesaler to indirect

purchaser was, in effect, one sale. The manufacturers set virtually all of the terms, the indirect purchaser (managed care) directly reaped the benefits, and the wholesalers continued to exist.

That same manufacturer control operated as well in the case of the retail pharmacies. As to these non-preferred indirect customers, the manufacturers decreed to the wholesalers that discounts were not to be given, and the wholesalers were in no financial position to stray from this directive. Once again, the manufacturers set all of the principal terms, the indirect purchaser (retail pharmacies) directly suffered the injury, and the wholesalers continued to exist. Under such a situation, where the manufacturers wielded such power over the wholesalers that they could altogether dictate the essential price the retail pharmacies were to pay, we do not believe that *Illinois Brick* applies. The pricing policies to be implemented at the wholesaler level were made exclusively by the manufacturers. Other than the wholesaler's fee, all of the critical pricing decisions regarding sales to managed care and to the plaintiffs were made by the manufacturers.

The plaintiffs allege that the Manufacturer Defendants' uniform refusal to provide them with the discounts provided to managed care caused the plaintiffs injury. Any harm sustained was the direct result of policies established by and within the exclusive control of the Manufacturer Defendants. The plaintiffs allege that they were harmed thereby, and it is clear that, under such circumstances, the plaintiffs were the only party harmed. Section 4 of the Clayton Act broadly provides: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may

sue therefor . . . and shall recover threefold the damages by him sustained . . . . " 15 U.S.C. § 15. To deny the plaintiffs in the present case the right to maintain its suit against the Manufacturer Defendants merely because the manufacturers have in place convenient middlemen for *Illinois Brick* protection would be to deny the plaintiffs any possibility for redress. Under the present circumstances, such a result would be improper.

Because we believe that the rationales set forth in *Illinois Brick* would not be furthered in the present case by disallowing the plaintiffs' claim against the manufacturers, the defendants' motion for summary judgment as to the indirect purchaser claims is denied. The control which the manufacturers' exercised over the wholesalers and any "indirect purchaser" transactions conducted effectively deemed those transactions one sale. That being so, *Illinois Brick* cannot apply.

CONCLUSION

For the reasons set forth above, the Manufacturer Defendants' motions for summary judgment are denied. The Wholesaler Defendants' motions for summary judgment are granted. The defendants' motions for summary judgment as to the indirect purchaser claims are denied.

/s/ _____
Charles P. Kocoras
United States District Judge

Dated: April 4, 1996

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 8, 1997

Before

Hon. Richard A. Posner, Chief Judge

Hon. William J. Bauer, Circuit Judge

Hon. Diane P. Wood, Circuit Judge

IN RE BRAND PRESCRIPTION DRUGS ANTITRUST LITIGATION Nos. 96-2458, 96-2485 96-2814, 97-2156	)	Appeal from the United States District Court for the Northern District of Illinois No. 94 C 897, MDL 997 Charles P. Kocoras, *Judge.*

ORDER

Petitions for rehearing with suggestions for rehearing *en banc* have been filed by Amerisource Corporation, DuPont Merck Pharmaceutical Company, Ciba-Geigy Corporation, and American Home Products Corporation. All the judges on the original panel have voted to deny the petitions, and none of the active judges had requested a vote on the suggestions for rehearing *en banc*. The petitions for rehearing are therefore DENIED.

Hon. Walter J. Cummings, Hon. Kenneth F. Ripple, and Hon. Daniel A. Manion did not participate in the consideration of the petitions.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-2814

IN RE BRAND-NAME PRESCRIPTION DRUGS
ANTITRUST LITIGATION

Proceedings Below:
94 Civ. 897, MDL 997
Appeal From the United States District Court
For the Northern District of Illinois,
Eastern Division
Honorable Charles P. Kocoras

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June 9, 1997

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* * *

Summary of Argument

1. *Illinois Brick* has no application to the situation involved in this case. *Illinois Brick* deals with a specific issue of law – namely, whether a purchaser of goods from an entity that has paid an overcharge as a result of an unlawful price-fixing conspiracy can sue to recover on the theory that a part of that overcharge was passed on by the direct purchaser. That is not the situation involved here.

The overcharges paid by the retail pharmacies in this case were imposed directly upon them by the manufacturers themselves. The pricing structure in the brand name prescription drug market is unique, involving a system of rebates and chargebacks that are designed to permit the drug manufacturers themselves to determine the price that purchasers from the wholesalers will pay. The wholesalers have no influence in the determination of these prices other than with respect to the modest fee they impose for their services.

The pricing structure in the market never involves a pass-on of overcharges by the wholesalers based upon the supply and demand characteristics of the market, such as envisioned and discussed in *Illinois Brick* and *Hanover Shoe*. Hence, there is never a situation in which apportionment of the burden of an overcharge would be required absent the rule announced in those cases.

No case cited by the manufacturers would justify the expansion of *Illinois Brick* to bar claims where there is

neither a pass-on nor an apportionment problem. *Utilicorp* and all of the other cases cited by the manufacturers are plainly distinguishable on this ground, and though plaintiffs concede that they have found no case directly in point, the principles recognized in many cases support their position here.

2. Even if *Illinois Brick* were held to be generally applicable here, the manufacturers could not avail themselves of that defense because these facts fall within the "owned or controlled" exception described in note 16 of the *Illinois Brick* opinion itself. Contrary to the manufacturers' assertion, the "owned or controlled" exception is not limited to situations in which the middleman is owned outright or legally controlled by the manufacturer.

As the Supreme Court made plain in note 16, the dominant consideration in determining the applicability of the exception is whether "market forces have been superseded." That is plainly the situation with respect to the role of the middleman in the pricing of brand name prescription drugs. The pricing structure in this market gives the wholesalers no control whatever over the prices paid by their customers beyond the wholesalers' modest service fee.

The district court's findings, which are fully supported by the evidence, bring this case clearly within the "owned or contolled" exception. Hence, this Court should affirm the district court's ruling that the *Illinois Brick* defense is not applicable. Alternatively, if the Court believes that there is a factual issue involved on which a full record should be developed, the Court should

remand the *Illinois Brick* issue to the district court for the development of that record.

* * *

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Supreme Court, U.S.
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No. 97-1148

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION,

AMERISOURCE CORPORATION, et al.,

Petitioners,

v.

HJB, INC., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

The question stated in the petition for writ of certiorari is not an accurate statement of any issue presented in this case. The proper statement of the issue presented by the decision of the court of appeals is: Does the evidence presented to the district court show the existence of a genuine issue of fact as to whether the Petitioners, wholesalers of brand name prescription drugs, participated in a conspiracy with pharmaceutical manufacturers to fix and maintain the prices paid by retail pharmacies?

RULE 29.6 STATEMENT

This Brief in Opposition is filed on behalf of several companies, all of which are named plaintiffs and class representatives in the class action pending in the district court. Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Class Plaintiff Respondents state:

a. This Brief in Opposition is filed on behalf of the following corporations:

Endlers' Pharmacy, Inc.

Barry's Cut Rate Stores, Inc.

Brady's Pharmacy, Inc.

Brady's Enterprises, Inc.

Conney's Pharmacy, Inc.

Meyers Pharmacy, Inc.

Strathmore Pharmacy, Inc.

Pat-Y-Ken Drug, Inc.

Starko, Inc.

Lurie Pharmacy, Inc.

b. None of the corporations listed in paragraph (a) of this Statement has a parent company.

c. None of the corporations listed in paragraph (a) of this Statement has any nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Respondents are retail pharmacies which have brought antitrust claims against the leading manufacturers and wholesalers of brand name prescription drugs.[1] In this lawsuit, the plaintiff retailers charge the manufacturers and wholesalers with violating Section 1 of the Sherman Act, 15 U.S.C. § 1, through a conspiracy to fix and maintain the prices paid by retailers. Jurisdiction in the district court was based, *inter alia,* on 28 U.S.C. § 1331. This Petition arises from interlocutory appeals of the April 4, 1996 rulings of the district court on defendants' motions for summary judgment.

In response to those motions, the retailers submitted compelling proof of a conspiracy in this industry to fix and maintain prices to retailers. The evidence showed that manufacturers and wholesalers frequently met to discuss their fear that aggressive price competition would spread to the retail sector, the largest sector of the market, and that these defendants reached a consensus to hold the line on this spread. (48a, 53a-56a, 58a-60a)[2] The evidence shows that the defendants refused to offer discounts to retailers, with a consistency, vigor and absoluteness that allowed no plausible explanation other than conspiracy. (52a-53a) The defendant manufacturers had suggested a possible nonconspira-

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[1] This petition was filed by the wholesaler defendants. A companion petition for a writ of certiorari has been filed by several of the manufacturer defendants, and is currently pending under the caption *Abbott Laboratories v. HJB, Inc.*, No. 97-1152.

[2] Citations in the form "__a" refer to pages of the Appendix to the Petition For Writ of Certiorari. No separate appendix accompanies this Brief for Respondents in Opposition.

torial explanation for their uniform refusals to discount—that retailers lacked the ability to increase the market shares of the defendants' products—but the evidence submitted by plaintiffs showed that this was not a reasonable and valid explanation for the defendants' actions. (65a-69a)

On the strength of this evidence, the district court denied the summary judgment motions of the manufacturer defendants. The district court found the record "replete with instances of collusive behavior, parallel conduct, uniformity of responses, mutual awareness of each others' policies and practices and incriminating quotes on the part of the defendants." (69a) The district court concluded:

> In spite of evidence that the retailers could move market share (in some cases, better than the preferred customers), the defendants uniformly persisted in their refusals to extend discounts to this entire segment of the market. Portions of the record belie the defendants' contention that the retailers refused the benefits of preferred customer status on account of the retailers' inability to influence the market. To the contrary, as discussed above, the record suggests that, having succumbed to the pressures of managed care, the manufacturers together set out to impose artificially high prices on the retail customers in order to retain their high profit margins. (70a)

The district court then proceeded to grant the summary judgment motion of the wholesaler defendants, the Petitioners now before this Court. In granting this motion, the district court reviewed the evidence and concluded that the price-fixing conspiracy was essentially

imposed on the wholesalers. "Recognition of the economic power of the manufacturers is apparent throughout this record, as is the wholesalers' grudging accession to some of the manufacturers' practices." (92a) Such "grudging accession" was not enough, the district court ruled, to hold the wholesalers liable as coconspirators, and it dismissed the claims against them. Subsequently, the district court issued a final judgment, pursuant to Fed. R. Civ. P. 54(b), on its dismissal of the claims against the wholesalers. Plaintiffs appealed that judgment to the United States Court of Appeals for the Seventh Circuit.

The manufacturers did not appeal the denial of their summary judgment motions. The court of appeals considered only the grant of summary judgment for the wholesaler defendants, reversed that judgment and reinstated the claims against these defendants. *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599 (7th Cir. 1997). In reaching that decision, the court of appeals resolved no issues of law. It merely assessed the evidence in the record and found that a reasonable jury, instructed on established rules of law regarding proof of a conspiracy, could find that these wholesalers had given affirmative support and assistance to the scheme to maintain the prices paid by retailers, enough assistance to deem the wholesalers liable as coconspirators. The court of appeals noted evidence "of a number of instances in which officers of the defendant wholesalers urge manufacturers to hold the line against discounting to pharmacies and their buying groups, and pledge to adhere to the chargeback system." 123 F.3d at 614.

The court remanded the case to the district court for trial. The district court has scheduled a September, 1998 trial on the claims of the class plaintiffs against the manufacturers and the wholesalers.

REASONS FOR DENYING THE PETITION

The foundation for this Petition is a false description of the decision of the court of appeals. According to the Petition, the court of appeals deemed inapplicable and disregarded the holding in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." The court of appeals made no such ruling. It applied *Matsushita* in a straightforward manner, adopting no construction of the case that even arguably conflicts with decisions of this Court or with decisions in other circuits. In an effort to find a legal issue worthy of review, Petitioners have presented this Court with a blatant misrepresentation of the decision below.

In fact, no significant legal issue is raised by the decision of the court of appeals to reverse the grant of summary judgment for the wholesaler defendants. The decision involved little more than a review of the evidence, which the court found sufficient to create a triable issue of fact as to whether the wholesaler defendants had joined in the manufacturers' price-fixing conspiracy. Petitioners disagree with that finding, but review in the Supreme Court is not justified for the reasons stated below.

I. Certiorari should be denied because this is an interlocutory appeal.

By vacating summary judgment, the court of appeals decided only that a trial may proceed on the price-fixing case against the wholesalers. The wholesalers might prevail on the merits of that trial, in which case they would have no need to seek review in this Court. Alternatively, the jury might find the wholesalers liable, and the wholesalers then could seek review of the verdict against them, but in that situation the more fully developed record produced by the trial would offer a better means to determine if a legal issue deserving of review is present and to decide any such issue if review were granted. The usual practice of this Court is to decline to review interlocutory decisions. *See, e.g., Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring); *Brotherhood of Locomotive Firemen v. Bangor & Aroostock RR*, 389 U.S. 327, 328 (1967). Nothing about this case warrants a departure from that practice.

II. The Petition presents an inaccurate statement of the decision below and asks this Court to review an issue not presented by this case.

This Petition rests entirely on a false description of the decision of the court of appeals as having adopted a particular interpretation of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The question that Petitioners ask this Court to review is not presented in this case.

Petitioners are unwilling to rely on the words used by the court of appeals to state its own ruling. In present-

ing how the court of appeals interpreted and applied *Matsushita*, the Petition never quotes any full sentences from the paragraphs that actually discuss *Matsushita*. Instead, it quotes some small snippets from the appellate opinion, but essentially gives its own version of the decision below. The most complete statement of Petitioners' version of events appears on page 11:

> The majority of the courts of appeals interprets the *Matsushita* standard in accordance with its terms and grants summary judgment to defendants if the evidence is "consistent with permissible competition," even if the alleged conspiracy is economically plausible. In contrast, a minority of the circuits, joined by the Seventh Circuit in this case, has held the rule of *Matsushita* inapplicable when the alleged conspirators had a plausible reason to conspire. (Petition 11)

The first sentence of this passage refers to a passage in *Matsushita* holding that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." 475 U.S. at 588. This was a reiteration of the rule that the Court had adopted two years earlier in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). According to the Petition, the court of appeals held this rule "inapplicable when the alleged conspirators had a plausible reason to conspire." (Petition 11)

But this is not how the court of appeals decided this case. To remove all doubt about the court's actual ruling, we quote in full the passage of the opinion that addresses *Matsushita*:

> But they [the wholesaler defendants] argue, pointing to *Matsushita* and other decisions by the Supreme Court and this court, that summary judgment for a defendant is proper, even if there is some evidence of an antitrust violation, if the plaintiff's theory of violation makes no economic sense. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 467-69, 112 S.Ct. 2072, 2082-83, 119 L.Ed.2d 265 (1992); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 49 (7th Cir. 1992); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir. 1986). This has to be the right rule, given the potential for jury confusion in litigation as enormous and esoteric as a billion-dollar antitrust damages action. (123 F.3d at 614)

Having made these references to *Matsushita*, the court of appeals then proceeded to a discussion of the evidence to show "that the defendants are wrong to argue that it would make no sense for the wholesalers to conspire with them to fix the prices of pharmaceutical drugs." *Id.* at 614. This is all that the court of appeals had to say about *Matsushita*.

The Petition clearly misstates this ruling. The court of appeals is not referring to the part of *Matsushita* that Petitioners discuss, the reiteration of the rule of *Monsanto* about inferring conspiracy from ambiguous evidence. The reference of the court of appeals, rather, is to a passage appearing earlier in the *Matsushita* opinion concerning the plausibility of the theory of conspiracy advanced by an antitrust plaintiff: "It follows from these

settled principles that if the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support the claim than would otherwise be necessary." 475 U.S. at 587. The court of appeals left no doubt that this rule of *Matsushita* is applicable to an antitrust case of this type without any qualification ("This has to be the right rule."). Petitioners had relied on this passage in one of their arguments in their appellate brief, and the court of appeals responded by showing that the facts did not support the argument.

III. The court of appeals applied *Matsushita* correctly.

The only question presented by the decision of the court of appeals is whether it correctly found the evidence sufficient to create a genuine issue of fact as to whether the wholesaler defendants had joined in the manufacturers' price-fixing conspiracy. Petitioners disagree with that decision and contend that it "cannot be reconciled with this Court's decision with *Matsushita*" (Petition 2), but those arguments do not justify review in this Court. "A Petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Moreover, the decision of the court of appeals was not erroneous. It was plainly correct.

There was no dispute in the court of appeals regarding the existence of a price-fixing conspiracy involving at least the manufacturers. The district court had denied

the manufacturers' motion for summary judgment, finding the evidence sufficient to prove that "having succumbed to the pressures of managed care, the manufacturers set out to impose artificially high prices on the retail customers to retain their high profit margins." (70a) That decision was not part of the appeal. 123 F.3d at 604. The issue on appeal was whether the evidence was sufficient to find that the wholesalers were a part of this conspiracy. 123 F.3d at 614-15.

The court of appeals found that "the record discloses a number of instances in which officers of the defendant wholesalers urge manufacturers to hold the line against discounting to pharmacies and their buying groups, and pledged to adhere to the chargeback system" 123 F.3d at 614, and the record contains a wealth of evidence to support that finding. (49a-78a) These wholesalers gave critical support to the manufacturers' price-fixing conspiracy, the evidence shows that they did, and they should be required to face that evidence at trial.

Nothing in this ruling is inconsistent with any part of *Matsushita*. It is faithful to the holding of *Matsushita* that conspiracy may not be inferred "in the absence of a plausible motive" to enter the conspiracy. The wholesaler defendants had very clear motives to enter and support the manufacturers' conspiracy. "Buying groups frequently act as their members' wholesaler," as the court of appeals explained, "buying directly from the manufacturer and thus cutting out independent wholesalers." 123 F.3d at 614. The wholesalers helped to head off this threat when they "joined with the manufacturers to hold the line against granting any discounts to such groups and so discourage their formation by reducing

the advantages of membership." *Id.* The wholesalers also had a motive to support the conspiracy by expanding the use of chargebacks, which gave them "a piece of the action with the favored customers, who were proliferating." *Id.*

These facts distinguish *Matsushita*, in which the defendant Japanese electronics manufacturers were charged with scheming to drive their American competitors out of business through two decades of predatory pricing. The court found that these defendants had "no motive to enter the alleged conspiracy," but rather "as presumably rational businesses, petitioners had every incentive *not* to engage in the conduct with which they are charged, for its likely effect would be to generate losses for petitioners with no corresponding gain." 475 U.S. at 595. The facts in this case are different; Petitioners enjoyed direct and immediate benefits from their participation in the conspiracy: protection from retail buying groups and access to favored customers.

The decision of the court of appeals also is consistent with the holding in *Matsushita* regarding ambiguous evidence of conspiracy:

> But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.*, at 764, 104 S.Ct., at 1470. See also *Cities Service, supra,* 391 U.S., at 280, 88 S.Ct., at 1588. To survive a motion for summary judgment or

> for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S., at 764, 104 S.Ct., at 1471.

The record in this case includes a wealth of evidence of wholesaler participation in the conspiracy that easily passes these requirements.

This evidence includes proof that the wholesalers used the forum of their trade association, the NWDA, to hold discussions on how to respond to retail buying groups and that they made requests of manufacturers not to bid to these buying groups at meetings of the NWDA and through its staff. (53a-54a) This evidence is not ambiguous. It is not "as consistent with permissible competition as with illegal conspiracy." Competitive firms do not join together to ask their suppliers to refuse to bid to other competitors; only firms seeking to prevent competition take such actions. This is the very kind of proof that *Monsanto* and *Matsushita* envision as sufficient to create a genuine issue of fact.

Petitioners argued to the court of appeals, as they do now, that the communications between the wholesalers and the manufacturers regarding bids to buying groups are no different from the complaints about price-cutters, which "the Court in *Monsanto* held inadequate (standing alone) to support the plaintiffs' claim."[3] (Petition 24) The

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[3] The Petition attempts to squeeze this case into the *Monsanto* mold by describing the communications of the wholesalers as "unilateral urgings" (Petition 24), but the evidence shows that in most instances where the wholesalers requested

(continued...)

evidence here shows much more than simple complaints to a supplier about price-cutters. It shows the wholesalers soliciting and receiving commitments from manufacturers that they would not bid to buying groups. (27a-28a, 53a-54a)

Similarly, with regard to the chargeback system, Petitioners invoke *Monsanto* for the proposition that "a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." *Monsanto,* 465 U.S. at 761. The evidence in this case shows not that the wholesalers acquiesced in a demand that they use the chargeback system, but that they took an active role in developing this system and promoting its wider use, so that they might get, as the court of appeals observed, "a piece of the action with the favored customers." 123 F.3d at 614.

The bottom line is that the "innocent interpretations" suggested by Petitioners are not necessarily correct. A reasonable jury could reject these suggested "interpretations" in favor of facts that are more firmly grounded in the evidence and not consistent with permissible competition. This plainly is what the court of appeals meant when it concluded that the "defendants' interpretations may be correct; they are not inevitable." 123 F.3d at 614.

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[3] (...continued)
the manufacturers to refrain from bidding to buying groups, the wholesalers were acting in groups at trade association meetings. (53a-54a)

Petitioners object to the construction of the evidence favorably to the plaintiffs (Petition 2, 9, 20), but this clearly is the correct standard. In *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), this Court held that on "summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." This Court affirmed that this standard applies to antitrust cases in *Matsushita*, 475 U.S. at 587, and again in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992).

Petitioners also complain that the "Seventh Circuit did not take issue with *any* of the district court's specific factual findings." (Petition 23) This complaint reflects a misunderstanding of the standard of review. The court of appeals reviews a grant of summary judgment *de novo*, considering the evidence on its own to determine whether it contains enough for a reasonable jury to find in favor of the party opposing summary judgment. *Johnson v. Jones*, 515 U.S. 304, 306 (1995). When an appellate court determines that a genuine issue of fact exists, as the court of appeals did here, it has only to vacate summary judgment and leave the fact-finding to the jury. The court of appeals does not sustain or vacate "the district court's specific factual findings."

Finally, lacking any substantial grounds to charge the court of appeals with error, the Petitioners resort to charging the members of the appellate panel with a dereliction of their responsibilities as judges. They claim that the court of appeals "simply brushed aside" their arguments (Petition 20), and then add: "Chief Judge Posner's opinion for the Seventh Circuit thus devoted

far more attention to a theoretical analysis of the plausibility of the plaintiffs' economic construct than to the nitty-gritty of the record." (Petition 21) "That led," Petitioners say, "to a lengthy flight of fancy in which the Seventh Circuit repeated plaintiffs' speculation." (Petition 21-22) In a footnote, Petitioners add a sanctimonious conclusion: "The court's theoretical bypass of the record was plainly inconsistent with its role. An appellate court considering a summary judgment issue must engage the record . . . ." (Petition 21 n. 9)

There is absolutely no basis for this charge. The court of appeals vacated summary judgment on grounds that are fully supported by evidence in the record. Petitioners no doubt are disappointed that the court of appeals did not decide the case as they wished, and perhaps they are not pleased by the colorful language ("tasty morsels") that is typical of Chief Judge Posner's style. But there is no justification for making an unfounded charge that Chief Judge Posner and his colleagues on the appellate court panel "bypass[ed] the record" and engaged in a "flight of fantasy". Such attacks on members of the federal judiciary have no place in a filing in this Court.

IV. The circuits are not split over the meaning of *Matsushita*.

According to the Petition, a "majority" of the circuits applies as written the holding in *Matsushita* that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy," 475 U.S. at 588, and applies this rule even when the conspiracy would serve the defendants' interests. (Petition 11) The circuits that

comprise this "majority," the Petition says, include the Second, Fourth, Fifth, Eighth, Tenth and Eleventh. (Petition 12)

The Seventh Circuit belongs in this list. The leading decision of the Seventh Circuit on the application of *Matsushita* is *Market Force Incorporated v. Wauwatosa Realty Co.*, 906 F.2d 1167 (7th Cir. 1990), which adopted "a two-part inquiry to determine whether summary judgment is appropriate in an antitrust conspiracy case," *id.* at 1171, as follows:

> "(1) is the plaintiff's evidence of conspiracy ambiguous, *i.e.*, is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests." *Id., quoting Gibson v. Greater Park City Co.*, 818 F.2d 722, 724 (10th Cir. 1987).

The two-part inquiry of *Market Force* is essentially a verbatim restatement of *Matsushita*. The Seventh Circuit has applied *Market Force* without recognizing any exceptions or limitations of the kind discussed in the Petition. *See, e.g., Serfecz v. Jewel Food Stores*, 67 F.3d 591, 599 (7th Cir. 1995); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 48-49 (7th Cir. 1992). The decision in this case certainly recognizes no exception. *See* pages 6-7, 10-11 above.

Indeed, the Seventh Circuit anticipated *Matsushita* and *Monsanto*. In *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742 (7th Cir. 1982), which involved a claim that competing distributors had conspired with their supplier to terminate a price-cutting competi-

tor, Judge Posner ruled that the claim required proof that the supplier "was acceding to [the other conspirators'] desires rather than acting to promote an independent conception of its self-interest." *Id.* at 744. *See also Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 660 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987) (*Matsushita* "is the standard that Judge Posner appears to have articulated in Valley I"). To characterize the Seventh Circuit, and Chief Judge Posner in particular, as renegades who are disregarding *Matsushita* in the hopes of opening the floodgates to frivolous antitrust claims is frankly absurd.

Petitioners' suggestion of a split in the circuits ultimately comes down to their disagreement with decisions from two other circuits: the Third, *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995); *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992), *cert. denied*, 507 U.S. 912 (1993); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir.), *cert. denied*, 510 U.S. 994 (1993), and the Ninth, *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990), *cert. denied*, 500 U.S. 959 (1991). Even if these cases are inconsistent with the decisions in other circuits, and it is not clear that they are inconsistent, they do not supply a reason for granting review of this case. As the citations indicate, this Court did not find an issue worthy of review in any of them; it denied certiorari in each one of them. Moreover, the court of appeals in this case did not follow these Third and Ninth Circuit decisions, it did not cite them, and it issued no ruling that suggests any conflict with any other circuits. This

case offers only the opportunity for the Court to review the evidence in this case prior to trial, which is not a good reason for this Court to grant the case a place on its limited docket or to add yet another year of delay to the trial of this already protracted litigation.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

February 11, 1998

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

AMERISOURCE CORPORATION, *et al.*,

Petitioners,

v.

HJB, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONERS

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PETITIONERS' RULE 29.6 STATEMENT

Petitioners' statement for purposes of this Court's Rule 29.6, which appears at Pet. ii-iii, remains accurate.

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REPLY BRIEF OF PETITIONERS

Respondents' opposition is notable for what it does *not* say. Respondents do not deny (indeed, they concede) that the courts of appeals are in conflict on the question presented in the petition. They do not deny that the issue is a recurring and enormously important one. They do not deny that questions about the application of *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), often arises in cases that affect the operation of national industries, or that this case *itself* involves an attempt to displace settled business practices that are essential to the efficient operation of the Nation's pharmaceuticals business. And they do not deny that, if our description of the Seventh Circuit's decision is accurate, the holding below cannot be reconciled with this Court's decision in *Matsushita*.

Instead, respondents hinge their opposition principally on the assertion that the petition misstates the court of appeals' holding. In making this claim, respondents demonstrate a notable facility for derogatory turns of phrase, variously labeling our position a "blatant misrepresentation" (Br. in Opp. 4), a "false description" (*id.* at 5), a "clear[ ] misstate[ment]" (*id.* at 7), an "attack[ ] on members of the federal judiciary" (*id.* at 14), and "frankly absurd" (*id.* at 16). This bluster, however, puts one in mind of the emperor's new clothes; respondents' vehemence evidently is designed to conceal the very noticeable lack of substance in their position. In fact, the Seventh Circuit's opinion states a standard that departs from *Matsushita*, that conflicts sharply with the holdings of other courts of appeals, and that will make it virtually impossible for antitrust defendants to obtain summary judgment whenever they have engaged in the sorts of routine communications along the *vertical* distribution chain that typically are unavoidable. In these circumstances, respondents have not offered any substantial reason for the Court to deny review.

1. Respondents assert that the petition is "unwilling to rely on the words used by the court of appeals to state its own ruling" (Br. in Opp. 5); they go on to contend (at 7-8, 10-12) that the decision below is faithful to *Matsushita*'s holding that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." 475 U.S. at 588. See *ibid.* ("antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case"). But that assertion misstates both our argument and the court of appeals' holding.

The relevant discussion in the Seventh Circuit's opinion is in two parts. The court first addressed the evidence in the record. Noting that petitioners offered "an innocent interpretation" of the various bits of evidence upon which respondents rely (Pet. App. 29a), the court of appeals held that summary judgment had to be denied because "[t]he defendants' interpretations may be correct; they are not *inevitable*." *Id.* at 30a (emphasis added). In reaching this conclusion, the court did *not* acknowledge, as respondents would have it, that ambiguous evidence is insufficient to overcome a defendant's motion for summary judgment. And the court expressly *rejected* the view that "when the evidence is in equipoise * * * summary judgment will be granted [to the defendant]" (2 P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 322, at 70 (rev. ed. 1995)), holding instead that the defendant must be denied summary judgment when its innocent interpretation of the evidence is not *inevitable*.

The court next addressed *Matsushita*. It recognized that, under *Matsushita*, "summary judgment for a defendant is proper, even if there is some evidence of an antitrust violation, if the plaintiff's theory of violation *makes no economic sense*." Pet App. 30a (emphasis added). The court went on to hold *Matsushita* inapplicable here because it could not be said that respondents' economic theory "make[s] no sense." *Id.* at 31a. As respondents correctly observe (at Br. in Opp. 7), "[t]his is all that the

court of appeals had to say about *Matsushita*." But that is precisely our point: the Seventh Circuit regarded *Matsushita* as relevant only when the plaintiff's economic theory is implausible. As we explain in the petition (at 12-19), that rule also has been adopted by the Third, Sixth, and Ninth Circuits, while being rejected by six other courts of appeals.

Although the court of appeals' characterization of the governing standard is clear enough, its minimalist take on *Matsushita* is confirmed by its treatment of the evidence in the case. The district court, which addressed *Matsushita* at length (see Pet. App. 43a-44a), closely reviewed the record and concluded that petitioners were entitled to summary judgment because the economic power and role of the pharmaceuticals manufacturers "more compellingly explains the chargeback system rather than theories of wholesaler complicity." *Id.* at 93a. In reversing this decision, the court of appeals did not take issue with the district court's finding that petitioners' conduct was as (or more) consistent with innocent conduct as with illegal conspiracy. *Matsushita*, 475 U.S. at 588. Instead, relying on conduct that this and other courts have found to be routinely present in noncollusive industries (see Pet. 17-18, 24-25), the Seventh Circuit denied summary judgment because the evidence was *not inconsistent* with respondents' theory of conspiracy – that is, the innocent interpretation was "not inevitable." The court of appeals thus misapplied *Matsushita*, and that mistake dictated the outcome of this case.

2. The court of appeals' error also comes clear from a close look at the record. In arguing that the decision below is consistent with *Matsushita*, respondents assert that the wholesalers conspired among *themselves* to deny sales to retail buying groups and that "[c]ompetitive firms do not join together to ask their suppliers to refuse to bid to other competitors" (Br. in Opp. 11); that the wholesalers were involved in "soliciting and receiving commitments from manufacturers that they would not

bid to buying groups" (*id.* at 12); and that the wholesalers "took an active role in developing [the chargeback] system and promoting its wider use." *Ibid.* Respondents' contention, however, misstates both the court of appeals' holding and the state of the record.

The court below did not rely upon (or suggest that there *was* any) evidence of the *horizontal* wholesalers' conspiracy now alleged by respondents. Nor did the court indicate that the wholesalers solicited or received commitments *from* the manufacturers. Nor did it even remotely suggest that the wholesalers promoted use of the chargeback system. Instead, the court of appeals relied *entirely* on what it characterized as evidence that the wholesalers "urge[d]" manufacturers not to discount to retail pharmacies and "pledge[d] to adhere to the chargeback system." Pet. App. 29a. Yet as we showed in the petition (at 23-26) – and as respondents conspicuously do *not* deny – this Court held in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), that virtually identical evidence of vertical communications between distributors and manufacturers is insufficient to defeat summary judgment. We also showed (at Pet. 17-19) that, faced with evidence that is essentially indistinguishable from the "tasty morsels" identified as the *most* probative portion of the record by the court below, other courts of appeals have ruled for antitrust defendants. Again, respondents make no response.

It may be that the court of appeals did not rely upon the sorts of evidence trumpeted by respondents because there is *no such evidence* in the record. Certainly, respondents' assertions find no support at all in the portions of the record that they cite in their opposition to the petition:

- Respondents assert that the wholesalers used their trade association to "join together" and "ma[k]e requests of manufacturers not to bid to * * * buying groups." Br. in Opp. 11. But the portion of the district court opinion cited

in support of this contention (Pet. App. 53a-54a) recounts evidence of "a 'general agreement' among *the Manufacturers* on the subject of selling to retail buying groups." *Id.* at 53a (emphasis added). In contrast, there is not a word suggesting that the *wholesalers* reached any agreement among themselves.

- Respondents assert (at Br. in Opp. 12) that the wholesalers solicited and received commitments from the manufacturers not to bid to retail buying groups. But the portion of the court of appeals' opinion cited by respondents in support of this contention (Pet. App. 27a-28a) addresses a jurisdictional question that is wholly off the point; the cited section of the district court opinion (*id.* at 53a-54a) again addresses evidence of an agreement *among manufacturers* and says nothing at all to suggest that the wholesalers either solicited or received any assurances *from* the manufacturers. The absence of any such evidence is hardly surprising: the district court expressly found that "[t]he wholesalers were *not* consulted about the no-discount policies prior to or during their implementation, and *no evidence* exists that the wholesalers' position was considered by or carried any weight with the manufacturers." Pet. App. 80a (emphasis added).

- Respondents assert (at Br. in Opp. 12) that the wholesalers "took an active role in developing" the chargeback system and "promot[ed] its wider use." But respondents cite *nothing at all* in support of this contention. In fact, as we have noted, the district court found (and the court of appeals did not disagree) that the wholesalers had *no* involvement "in the decisions not to afford

discounts to the plaintiffs" and did not have a "conscious commitment to achieve the unlawful objective." Pet. App. 80a; see *id.* at 93a.[1]

Having said this, it bears emphasis that the dispute here is not a factual one. Instead, our disagreement is with the legal standard applied to the facts by the court of appeals. Nor do we contend, as respondents would have it (at Br. in Opp. 13), that under the governing summary judgment standard evidence should not be construed "favorably to [antitrust] plaintiffs." Our submission, rather, is that *substantive* "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita*, 475 U.S. at 588. Questions concerning the proper application of that principle arise frequently and – as is demonstrated by the disagreement between the court of appeals and the district court in this case – the choice of an incorrect legal standard by the Seventh Circuit in implementing that principle determined the outcome here.

3. Respondents acknowledge (at Br. in Opp. 16), albeit grudgingly, that the Third and Ninth Circuits have held that summary judgment must be denied if the

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[1] Respondents' statement of the case suffers from the same error. Although respondents assert that "the defendants reached a consensus to hold the line on th[e] spread" of price competition and declare that "the defendants refused to offer discounts to retailers, with a consistency, vigor and absoluteness that allowed no plausible explanation other than conspiracy" (Br. in Opp. 1), the evidence they cite in support of these contentions relates only to the *manufacturers*. Respondents therefore are wrong when they conclude that "the district court reviewed the evidence and concluded that the price-fixing conspiracy was essentially imposed on the wholesalers." *Id.* at 2-3. The district court did not find that the wholesalers were reluctant participants in the conspiracy, as respondents' statement suggests; instead, the court found that they were *not members of the alleged conspiracy at all*. See Pet. App. 93a-94a.

alleged conspiracy makes economic sense and the inferences of conspiracy and innocent conduct are equally plausible; respondents likewise make no attempt to distinguish *Ezzo's Investments, Inc.* v. *Royal Beauty Supply, Inc.*, 94 F.3d 1032 (6th Cir. 1996), which, as we showed in the petition (at 16), places the Sixth Circuit in the same camp. As we noted in the petition, Pet. 14-16, Professor Areeda observed that the decisions in these circuits depart from *Matsushita*. At the same time, respondents seem to recognize that the approach of these courts of appeals cannot be reconciled with the holdings of the Second, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits. See Br. in Opp. 15. But citing decisions of the Seventh Circuit that predated the holding below, respondents assert that this Court should disregard the conflict among the courts of appeals because the Seventh Circuit has aligned itself with the majority doctrine. See *id.* at 14-17.

This contention is without merit. For one thing, the older Seventh Circuit decisions cited by respondents are ambiguous; while those opinions state that antitrust plaintiffs opposing summary judgment must advance evidence " 'that tends to exclude the possibility that the defendants were pursuing * * * independent interests' " (Br. in Opp. 15, quoting *Market Force Inc.* v. *Wauwatosa Realty Co.*, 906 F.2d 1167, 1171 (7th Cir. 1990)), they never identify the quantum of evidence the plaintiffs must adduce (that is, the decisions do not establish whether plaintiffs must do more than advance evidence that is consistent with conspiracy). Indeed, the most recent of the decisions cited by respondents (at Br. in Opp. 15) relied on a holding of the Third Circuit that respondents appear to recognize as *rejecting* the majority rule. *Serfecz* v. *Jewel Food Stores*, 67 F.3d 591, 602 (7th Cir. 1995), cert. denied, 116 S. Ct. 1042 (1996), citing *Alvord-Polk, Inc.* v. *F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994), cert. denied, 514 U.S. 1063 (1995). And that the Seventh Circuit characterized a pre-*Matsushita* opinion of then-Judge Posner as

one that " 'appears to have articulated' " the *Matsushita* standard (Br. in Opp. 16, quoting *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 822 F.2d 656, 660 (7th Cir.), cert. denied, 484 U.S. 977 (1987)) hardly proves respondents' point; the question here is whether the Seventh Circuit properly understands that standard.[2]

In any event, respondents' discussion of the older cases is largely immaterial. The decision below clearly states the controlling rule; because the court of appeals denied a suggestion for rehearing en banc, that decision must be taken as an authoritative statement of the law in the Seventh Circuit. And given the acknowledged conflict among the courts of appeals, any disagreement within the Seventh Circuit (assuming that such disagreement exists) would not provide a justification for denying review now. Indeed, that there is a divergence of opinion within as well as between the courts of appeals (as to which, see also Pet. 15 n.7) serves only to demonstrate the pervasive confusion in the lower courts about the meaning of *Matsushita* and to confirm the need for this Court to clarify the law. After all, the courts of appeals have been struggling with the meaning of *Matsushita* for almost twelve years, and there is no prospect that they will reach a consensus on their own.

4. Finally, respondents' assertion (at Br. in Opp. 5) that certiorari should be denied because the appeal is interlocutory is simply silly. The question presented in the petition concerns the standard governing the award of summary judgment – and it will be impossible to address that important issue after a remand. The Court accordingly

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[2] We note that respondents are wrong in suggesting that we are offended by the "colorful language" that appears in the opinion below; we yield to none in our appreciation for Chief Judge Posner's engaging prose style. But the metaphor of "tasty morsels" employed below (Pet. App. 29a) should not obscure the court of appeals' failure to answer the obvious question about respondents' case: where's the beef?

has granted review of many cases involving challenges to the denial of summary judgment, including (very notably) *Matsushita* itself. See also, *e.g.*, *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992).

5. In light of respondents' express concessions and notable silences, it may be taken as settled that this billion-dollar case is one of enormous importance to the operation of the Nation's pharmaceuticals industry. It is essentially undisputed that the circuits are in conflict on a recurring issue of tremendous legal and practical significance. And it is plain on the face of the court of appeals' opinion that this case squarely presents the question whether the *Matsushita* standard applies when the plaintiffs' economic theory is plausible. Resolution of that question will end considerable confusion in the lower courts, while contributing mightily to the efficient and equitable resolution of antitrust suits.[3]

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[3] While the Court recently denied certiorari in *Corner Pocket of Sioux Falls, Inc.* v. *Powerhouse Tech.*, 1998 WL 70347 (No. 97-1097) (Feb. 23, 1998), a case that also presented questions concerning the application of *Matsushita*, that action does not militate against review here. In sharp contrast to *Corner Pocket*, in which the court of appeals properly applied *Matsushita*, the decision below creates considerable uncertainty, calling into question the legality of widespread business practices and routine communications along the *vertical* distribution chain. Moreover, *Corner Pocket* would not have presented an appropriate vehicle with which to resolve the question presented here. Most of the plaintiffs' evidence in that case was excluded on hearsay grounds, leaving the plaintiffs to rely exclusively on evidence of conscious parallelism and a unilateral refusal to deal (see *Corner Pocket of Sioux Falls, Inc.* v. *Video Lottery Technologies, Inc.*, 979 F. Supp. 1269, 1281-1285 (D.S.D. 1996)) – and evidence of that sort is not regarded as sufficient to defeat summary judgment in *any* circuit. The choice of legal standard therefore did not affect the outcome in *Corner Pocket*. And *Corner Pocket* presented allegations of a conspiracy that was geographically and temporally limited; this case

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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